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United States
Circuit Court of Appeals
For the Ninth Circuit.

FREDERICK EGGERS, as Sheriff of the City
and County of San Francisco, California,
SOPHIE SUTER, SOPHIE SUTER, as
Executrix of the Will of DANIEL SUTER,
Deceased, and OTTO tum SUDEN,
Appellants,

vs.

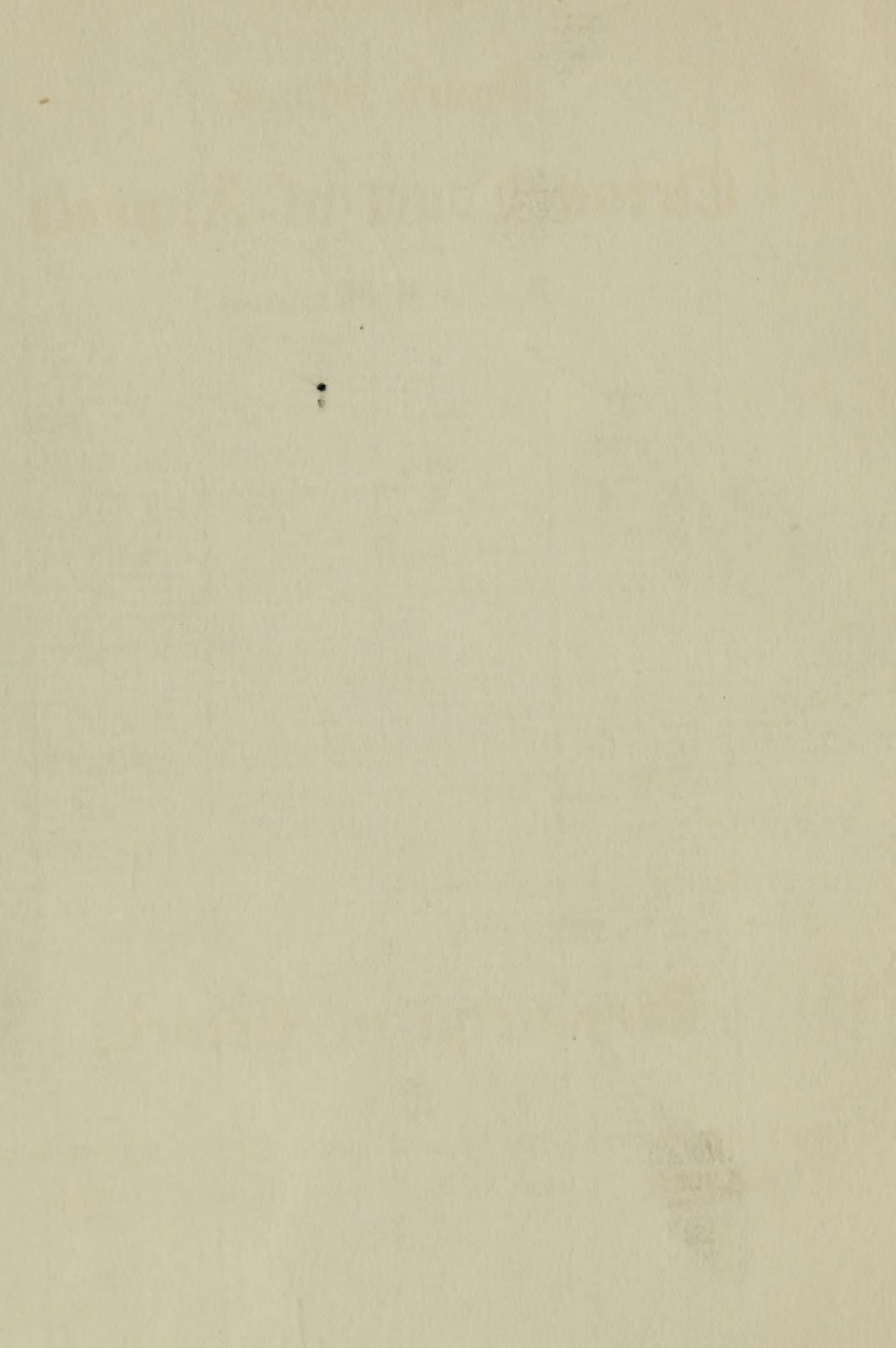
AUGUST FERDINAND KRUEGER (Otherwise
KRUGER), Administrator of the Estate of
ANNA MARIA KRUEGER (Otherwise
KRUGER), Deceased,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
Northern District of California, Second Division.

Filed

DEC 7 - 1915



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, Northern
District of the State of California, Second Di-
vision.*

IN EQUITY.

AUGUST FERDINAND KRUEGER (Otherwise
KRUGER), as Administrator of the Estate of
ANNA MARIA KRUEGER (Otherwise
KRUGER), Deceased,

Plaintiff,

vs.

FREDERICK EGGERS, Sheriff of the City and
County of San Francisco, California; SO-
PHIE SUTER, as Executrix of the Will of
DANIEL SUTER, Deceased; SOPHIE
SUTER, OTTO tum SUDEN, EDWARD C.
HARRISON and MAURICE E. HARRI-
SON,

Defendants.

Complaint.

To the Hon. the Judges of the District Court of the
United States in and for the Northern District
of California.

Plaintiff complains of defendants and for cause of
complaint alleges;

I.

That plaintiff is, and always has been, a citizen of
the Republic of Switzerland, though for more than fif-
teen years past and immediately prior to the filing of
this complaint, plaintiff has resided in the City and
County of San Francisco, State of California, such
residence in said city, county and state being con-
tinuous.

II.

That Anna Maria Krueger (otherwise Kruger), deceased, hereinafter referred to as Anna Maria Krueger, was, at the time of her death, a citizen of the Republic of Switzerland, though, she had resided, for many years, prior to her death, in the City and County of San Francisco, State of California, and, during her lifetime, while living in said city, county and state, resided with plaintiff, on the real property hereinafter described.

III.

That, said Anna Maria Krueger, deceased, was, at the time of [1*] her death, and for many years prior thereto, the owner of, and in the possession of, in fee simple absolute, of all that certain piece of real estate, situated in the City and County of San Francisco, State of California, particularly described as follows, to wit:

Beginning at a point on the westerly line of Ninth Avenue, distant thereon 100 feet southerly from the southerly line of Clement street; running thence southerly along said westerly line of Ninth Avenue 75 feet; thence at right angles westerly 100 feet; thence at right angles northerly 25 feet; thence at right angles westerly 120 feet to a point in the easterly line of Tenth Avenue; thence northerly along said easterly line of Tenth Avenue 50 feet; thence at a right angle easterly 182 feet and 6 inches; thence at a right angle northerly 100 feet to a point in the southerly line of Clement street; thence easterly along said southerly line of Clement street 25 feet;

*Page number appearing at foot of page of original certified Record.

thence at right angles southerly 100 feet; and thence at a right angle easterly 32 feet and 6 inches to said westerly line of Ninth Avenue and point of commencement.

Being part of Outside Land, Block 190, together with the improvements thereon and their appurtenances.

IV.

That, during her lifetime, said Anna Maria Krueger, deceased, became indebted to the Hibernia Savings & Loan Society, in the City and County of San Francisco, California, hereinafter referred to as the Hibernia Bank, in different sums of money, which said sums of money, so owing, were, on the —— day of ——, 1897, consolidated in a single sum, evidenced by a promissory note therefor, the payment thereof being secured by a mortgage of even date with said promissory note, executed and delivered by the said Anna Maria Krueger, deceased, to the Hibernia Bank, upon the said real property herein described. That said note and mortgage was in full force and effect at the same time of said Anna Maria Krueger's death.

V.

That, during said Anna Maria Krueger's lifetime, she also became indebted to one, Daniel Suter, a lawyer and money lender, in said City and County of San Francisco, in various sums of money, which were consolidated in two promissory notes, the payment thereof being secured by a mortgage of even date with [2] said notes, executed and delivered by said Anna Maria Krueger to said Daniel Suter,

said mortgage and notes being secondary to the mortgage and note of the Hibernia Bank.

VI.

That, on or about May 1st, 1902, Anna Maria Krueger, died, intestate, in said City and County of San Francisco, leaving her surviving, as her only heir, plaintiff herein. That said Anna Maria Krueger died in the building on said real property hereinabove described, and that at the time of her death, plaintiff was living with her, in said building, on said real property, and attended to her funeral. That in proceedings No. 27,450, Superior Court, of the State of California, in and for the City and County of San Francisco, John Farnham, as public administrator, of said city and county, petitioned for his appointment as administrator of the estate of said Anna Maria Krueger, deceased, setting forth, among other things, in his petition, that deceased had no heirs and no money, but the real property herein described; that, after hearing duly had, in Department 9 of said Superior Court, said Farnham was duly appointed, and thereafter qualified, as the administrator of the estate of said Anna Maria Krueger, mother of plaintiff, all of which was unknown to and without the consent of plaintiff, and, without plaintiff having, at any time received any notice of the filing of said petition, or, of the time and place of hearing the same, though said Farnham, with due diligence could have ascertained that plaintiff was the heir of said deceased.

That said Farnham proceeded with the administration of said estate, as required by law, all notices

being properly given, and orders therefor duly made. That the Hibernia Bank duly presented its claim for the sum of \$2,002.60, under its said mortgage, which said claim was, on October 22, 1902, approved and allowed by the [3] judge of said department 9; also, said Daniel Suter presented a claim on two promissory notes, totaling \$1,850.00, but, said claim was rejected by said Court, as being barred under Section 1499 of the Code of Civil Procedure.

VII.

That, in the month of November, 1902, in said Superior Court, in action No. 82,815, said Hibernia Bank sued to foreclose its said mortgage and allowed claim, making said Farnham, as administrator of the estate of Anna Maria Krueger, deceased, and, said Suter, defendants; no affidavit of service of the complaint of foreclosure on said Farnham, as administrator, or otherwise, was made and filed; that no service of summons in said action for foreclosure, with a copy of the complaint in said action attached was ever made on said Farnham, as administrator, nor an affidavit of serving such made and filed in said Superior Court; that no answer, appearance or demurrer was ever filed in said action to foreclose said Hibernia Bank mortgage by the said administrator, or by any person in his behalf; that the said Superior Court did not, at any time, prior to the obtaining of a judgment of foreclosure against said administrator, have jurisdiction of the said administrator of the estate of the said Anna Maria Krueger, deceased, or of the property of the said estate. That said Suter filed an answer, and the only answer

filed in said foreclosure action, asking that said Hibernia Bank have its decree of foreclosure as prayed for, and, also, that his rejected claim of \$1,850.00 be allowed and included in said decree of foreclosure as foreclosed; that, thereafter, on hearing before the Hon. J. C. B. Hebbard, in said Superior Court, a decree of foreclosure was made, whereby it was found that there was due said Hibernia Bank the sum of \$2,140.00, and, to said Daniel Suter the sum of \$1,850. as a second mortgage, [4] and one Oliver was then appointed to sell, as commissioner, said real property herein described, and directed to pay said loans out of the proceeds of said sale; that, at said hearing of said complaint in foreclosure, said administrator of the estate of Anna Maria Krueger, deceased, did not appear before the said Court, nor was he represented therein by counsel; that, after notice given, said property was, on July 8, 1903, sold to Daniel Suter for the sum of \$5,250.00, and, thereafter, said Oliver, as said commissioner, issued to said Suter a Certificate of Purchase, but did not, thereafter, execute to said Suter, or his assigns a deed conveying the title to said property to said Suter; that, at said sale the said Suter was not an innocent purchaser of said property, without notice.

VIII.

That, the above-mentioned judgment last mentioned, was absolutely void, for want of jurisdiction in the said Court, to make the same, under the circumstances stated in paragraph VII hereof, and a fraud on the estate of said Anna Maria Krueger, deceased; and the legal representative of said de-

ceased's estate had no opportunity to have his day in court, and to present the facts of the case to the Court.

IX.

That, during the month of April, 1904, plaintiff, for the first time, discovered that said John Farnham, had been appointed administrator of the estate of his mother, said Anna Maria Krueger, and, that said Hibernia Bank had foreclosed its said mortgage, and that under the said judgment of foreclosure, said property had been bought by said Suter; that, during all these proceedings, and times, said plaintiff received no notice of the same, nor was he notified to attend in court, nor did he have a day in court, or a chance to state the real facts concerning the same, or to protect his interests in said estate, or the said estate, though he was, at all [5] times in said City and County of San Francisco, living and dwelling on said real property herein described, and, also, was making regular payments of interest to said Suter; that, as soon as plaintiff was apprised of the said condition of the said estate of his said mother said Anna Maria Krueger, deceased, he had himself appointed administrator of the estate of Anna Maria Kreuger, deceased, in the place and stead of the said John Farnham, and still is the administrator of the said estate. Then, as administrator of the estate of Anna Maria Krueger, deceased, moved, in the said Superior Court, that said decree of foreclosure be set aside, together with all proceedings had thereon, on the ground and for the reason that said Court did not have jurisdiction to make and give said judg-

ment of foreclosure, and, that said judgment was void for want of jurisdiction, and a fraud on the said estate of Anna Maria Krueger, deceased, and, that it deprived the said estate of its property, and the heirs thereof of their just inheritance, without a day or hearing in court, and, after due notice given to the said Hibernia Bank and the said Daniel Suter of the time and place for hearing the motion to set aside the said void judgment of foreclosure the said Court made its order setting aside the said judgment of foreclosure and all proceedings had thereon and thereafter; that said Suter appeared in said court at the hearing of said motion to set aside the said judgment, though said Hibernia Bank did not appear. That, from the order of said court setting aside the said void judgment of foreclosure of said mortgage of said Hibernia Bank, under which said sale of said real property was made to the said Suter, no appeal or motion for a new trial was made, taken or attempted, nor has there been any appear or motion for a new trial taken or made to or from said order setting aside said judgment. [6]

X.

Tha plaintiff *has*, at all times herein mentioned, and now is, in the possession of and residing upon the said real property hereinabove described.

XI.

That, on June 5th, 1913, Daniel Suter died, in San Francisco, and his wife, Sophie Suter, one of the defendants herein, after due proceedings had, was appointed, and then qualified, and is now acting as the executrix of the will of Daniel Suter, deceased.

XII.

That, on August 5, 1913, said Sophie Suter, as said executrix, commenced proceedings in the Superior Court of the State of California, in and for the City and County of San Francisco, action No. 50,766, against plaintiff herein, individually, and not as administrator of the estate of Anna Maria Krueger, deceased, to eject plaintiff from said property, herein described, as will more fully appear by reference to said proceedings still remaining of record; that, said action was tried before Hon. George A. Sturtevant, on the 3d day of March, 1914, defendants Edward C. Harrison and Maurice E. Harrison appearing as counsel for said Sophie Suter, executrix, and said plaintiff herein, the defendant in said action, appearing in *propria persona*, attempting to defend said action, said plaintiff being without money to employ legal aid; that, at the suggestion of said defendants, Edward C. Harrison and Maurice E. Harrison, Otto Tum Suden, defendant herein, was, by the Court, appointed as guardian *ad litem* of plaintiff, in said action, for the purpose of appearing for said plaintiff and representing him and to present his defense in said action, and, to protect and care for plaintiff's interests in said action. That, after the trial of said action, the Hon. George A. Sturtevant rendered a decision in favor of the defendant in said action, the plaintiff herein, with costs of action, and dismissed the action, [7] which judgment as so rendered, was entered in Judgment Book 50 of said Court, page 210, on March 4th, 1914.

XIII.

That, thereafter, without the consent of plaintiff herein, and, without his knowledge, and, without, in any manner or form, being consulted or informed, and, without having any authority from plaintiff or the order of the said Court in said action, or, the order of the probate court in the Estate of Anna Maria Kreuger, deceased, and, without giving plaintiff herein opportunity to seek and to obtain separate and proper legal advice, and, without any effort to protect the interests of plaintiff in the estate of the said mother, or, to protect the property of said estate of said Anna Maria Krueger, deceased, and, without regard to his duties and obligations, as a guardian *ad litem*, and in excess and beyond his power and authority, said plaintiff herein being at all times an adult, and not insane or in any way incompetent to attend to his business or his property, nor, at any time having a judgment of incompetency rendered against him, the said Otto Tum Suden, defendant herein, conspired with and fraudulently agreed with said defendants, Edward C. Harrison and Maurice E. Harrison, and Sophie Suter, as executrix, and Sophie Suter, individually, that said judgment rendered and made against said Sophie Suter, executrix, and in favor of the defendant, plaintiff herein, be set aside, and, to such end, said defendant Otto Tum Suden filed papers in said action, permitting said judgment to be set aside, and waived all rights of appeal, in this plaintiff to such action; and, thereafter, said defendant Otto Tum Suden, allowed and permitted the said action

of Sophie Sutter, Executrix, vs. A. F. Krueger, as an individual, and not as the administrator of the Estate of Anna Marie Krueger, deceased, to be brought to trial again, and, on the 11th [8] day of July, 1914, and, without calling any of the witnesses called at the first trial, and, without calling any witnesses at all, and, without calling this plaintiff or notifying this plaintiff to be in court, and, this plaintiff not being in court, though at all times he is mentally able to fully comprehend the nature of courts, of laws, and the necessity of appearing in courts, on the hearing of matters before them, said defendant Otto Tum Suden allowed and permitted, in furtherance of the fraud and conspiracy between said defendants to deprive this plaintiff of his interests and rights in the property of the Estate of Anna Maria Krueger, deceased, and, to deprive and take away the property of the said Estate of Anna Maria Krueger, deceased, a judgment to be made and entered by the Court against this plaintiff, as defendant in said action, and in favor of said Sophie Suter, as the executrix of the Will of Daniel Suter, deceased, which said judgment recites, falsely, that said Daniel Suter, prior to his death, was the owner in fee simple and entitled to the possession of all of said real property herein described; and, that said property belongs to said Sophie Suter, as said executrix; and, purporting to quiet title to said real property in said Sophie Suter; and, to bar and enjoin all persons, including plaintiff, but not plaintiff as the administrator of the Estate of Anna Maria Krueger, deceased, from making any claim thereto, and, further, plaintiff is

ordered to pay costs of action; thereafter, said defendant, Otto Tum Suden, informed plaintiff that he had received from said Sophie Suter, executrix, \$1,500.00 to be paid to plaintiff for his interests in said property, out of which sum was to be deducted the sum of \$250.00 by said Otto Tum Sudden as a fee for legal services rendered, and, that this sum was paid under an order of the said Court of compromise after said Otto Tum Suden and said defendant, Edward C. Harrison, had agreed that such [9] sum should be paid to said plaintiff. This was rejected by this plaintiff.

That, prior to, at the time of, and always, the filing of said action against this plaintiff by said Sophie Suter, executrix, and the making and entry of said second judgment in said action, the said defendants, Otto Tum Suden, Edward C. Harrison, Maurice E. Harrison, and Sophie Suter fully knew and were fully advised, and charged with full and complete knowledge of all the facts, and conditions of the title and proceedings relating to the said real property herein described, and well knew that said Daniel Suter had no right, title or ownership therein or thereof, but, in defiance thereof, proceeded, as herein set forth, to take said property, without giving this plaintiff, either individually or as said administrator, his day in court, to his irreparable loss and damage.

XIV.

That said defendant, Frederick Eggers, is the duly elected, qualified and acting sheriff of the City and County of San Francisco, California; that said defendants, Otto Tum Suden, Edward C. Harrison,

Maurice E. Harrison and Sophie Suter, have caused a Writ of Possession to issue, and have placed the same in the hands of said defendant Eggers, for service and execution, and, said defendant is now attempting to execute the same and to dispossess plaintiff, and he will execute the said writ and dispossess plaintiff, to the irreparable damage and loss to the estate of Anna Maria Krueger, deceased, and this plaintiff, unless this Court restrain said defendants from proceeding with said writ of possession.

XV.

That plaintiff is the duly appointed, qualified and acting administrator of the estate of Anna Maria Krueger, deceased, that said estate is still in the course of probate, incomplete and not yet [10] closed, no payment of the expenses of administration, commissions or attorneys' fees, or charges against its property having been made.

XVI.

That said real property, as far as plaintiff can ascertain, is of the value of \$18,000.00. That, on January 22d, 1910, Daniel Suter offered to pay plaintiff \$1750.00 for said property. This was rejected by plaintiff.

XVII.

That this plaintiff has a good and meritorious defense to the enforcement of the said judgment, fraudulently caused to be entered by the said defendants in the said action of Sophie Suter, executrix, vs. A. F. Krueger (individually), and, that said plaintiff has fully and fairly stated to his attorneys all the facts of the case, and they have advised him that he

has a good and meritorious defense to the enforcement of said judgment.

XVIII.

That plaintiff is not incompetent, mentally unsound, insane, or unable to attend to and care for his property and business affairs, nor, has plaintiff had a judgment of incompetency, unsoundness or insanity made and entered against him, declaring him incompetent, or unsound or insane, nor, have any proceedings been instituted against plaintiff, by anyone, to have him declared incompetent, or insane, or mentally unsound. That the main trouble with this plaintiff has been his great lack of money with which to defray the expenses of his litigation, pay counsel fees, court costs, and, in seeking to get justice and have his day in court, and a day in court for the said estate of Anna Maria Krueger, deceased, this plaintiff has been sorely hampered and impeded by his lack of money. (11)

XIX.

That the said Otto Tum Suden, Edward C. Harrison, Maurice E. Harrison and Sophie Suter, defendants, have entered into and formed a conspiracy for the purpose of defrauding plaintiff of his interests in the estate of his said mother, Anna Maria Krueger, deceased, and, of depriving the said Estate of Anna Maria Krueger, deceased, of the property, herein described, and vesting the title thereof in said Sophie Suter, and, in furtherance of said conspiracy and fraud, said defendants have committed and caused to be committed and done all the matters and things hereinabove referred to from the day

that this plaintiff, as defendant, individually, obtained a judgment against defendant herein Sophie Suter, executrix, before Judge Sturtevant, whereby said Sophie Suter's action against this plaintiff was dismissed; also, as a further evidence of said conspiracy of said defendants, plaintiff sets forth that defendants have willfully, wrongfully and with knowledge and intent to deprive plaintiff of his interest in said real property, and, to deprive the said estate of Anna Maria Krueger, deceased, of the said real property, caused and perfected and executed such an agreement between themselves, whereby said judgment in favor of this plaintiff, individually, without right or authority, and without plaintiff having his day in court, to be set aside, and a new judgment entered in favor of said defendant, Sophie Suter, executrix; that this act of defendants will cause plaintiff the loss of his interest in the estate of Anna Maria Krueger, deceased, and also, the loss of the real property of the estate of said Anna Maria Krueger, deceased; that said defendants entered into the said conspiracy and agreement to defraud plaintiff and the estate of Anna Maria Krueger, deceased, with full knowledge of all the conditions of the legal actions had regarding [12] the title to said real property, and knew from such knowledge that the title to said real property was not in said Daniel Suter, notwithstanding any papers that may have been found among the effects of said Daniel Suter, after his death, by virtue of which the said Daniel Suter did not, at any time during his lifetime assert claim, right, title and own-

ership to and in the said real property herein described; that defendants, well knowing that the said judgment of foreclosure had in said suit by the said Hibernia Bank against the said Farnham, as administrator of the estate of Anna Maria Krueger, deceased was a void judgment for want of jurisdiction in the court to make the same, and, that a fraud had been worked upon the said estate of said Anna Maria Krueger, deceased, preventing said estate, as well as this plaintiff, from obtaining the benefit of a defense and day in court; that said defendants, knowing plaintiff to be a foreigner, of peculiar ideas and manners, not fully understanding the laws, in particular of the State of California, have used such as a further means of defrauding this plaintiff and the said estate of Anna Maria Krueger, deceased.

XX.

That the said conspiracy of said defendants, and the acts in furtherance thereof, are contrary to equity, seeking to take real property by an alleged title based on a judgment, void for want of jurisdiction, which ought not to be enforced in good conscience or equity, and, if permitted by this Court, will be an irreparable loss and damage to plaintiff and the Estate of Anna Maria Krueger, deceased, depriving plaintiff and said estate of Anna Maria Krueger, deceased, of property without their having had a day in court, or by due process of law, properly and legally done. [13]

XXI.

That this plaintiff has at different times prior hereto, offered to pay to said defendant Sophie Suter,

executrix, such money as was due to her said husband, the money to be obtained by a sale of the premises herein described, and such sum paid them as was justly due, and the balance of such money retained by the estate of said Anna Maria Krueger, deceased, and plaintiff here states that he is now, and always has been, willing to do equity to the estate of said Daniel Suter, deceased, and has not, at any time sought to willfully and purposely evade the payment to the said Suter of all moneys rightfully due him.

XXII.

That, from the day when the said void judgment obtained by the said Hibernia Bank was set aside to the day of filing the complaint of Sophie Suter, executrix, vs. A. F. Krueger, an individual, to wit, an interim of about ten years, no action, in any respect was taken by the said Daniel Suter to eject plaintiff or the estate of Anna Maria Krueger, from the real property herein described, or to set up and claim ownership thereof, the said plaintiff herein paying the taxes, during said time, against said property, and being in possession of the same to the exclusion of all others.

XXIII.

That plaintiff can have no adequate remedy or relief except in this court and to the end, therefore, that said defendants and each of them may, if they or either of them can show why plaintiff should not have the relief hereby prayed, and they make a full disclosure and discovery of all matters aforesaid and according to the best and utmost of their and

each of their knowledge, remembrance, information and belief, and that full, true, direct and [14] perfect answers be made to the matters stated hereinbefore and charged and not under oath,—and answer under oath being hereby expressly waived,—plaintiff prays this Honorable Court may grant the writs of injunction, both interlocutory and perpetual issuing out of and under the seal of this Honorable Court, perpetually enjoining and restraining said defendant Sophie Suter, executrix of the Will of Daniel Suter, deceased, her clerks, attorneys, agents, solicitors and assigns from dealing with, charging, conveying or in any manner transferring, selling, or encumbering said real property or any part thereof, and, or from interfering with the plaintiff in the control and management of the said property under direction of said probate court; also, that said defendants, and each of them, do not further take or cause to be taken any steps in the proceedings or premises, and that if this Court sees fit, a Receiver be appointed to take charge of said real property pending the termination of this suit.

And may it please this Honorable Court to grant unto said plaintiff not only the writ of injunction perpetual and interlocutory and the appointment of a Receiver, but, also, such other, further, separate, different and additional orders as to the Court shall seem meet in the premises, including writs of subpoena of the United States of America, directing such persons as necessary to appear for the termina-

tion of this suit before this Court and perform the orders of this Court.

WARNER TEMPLE,
MERCER H. FARRAR,
Attorneys for Plaintiff. [15]

The United States of America,
Northern Judicial District of California,
State of California,
City and County of San Francisco.

On this 29th day of July, 1915, at and in the City and County of San Francisco, State of California, before me, personally, appeared August Ferdinand Krueger (otherwise Kruger), the plaintiff named in the foregoing Bill of Complaint, and, being duly sworn by me, made solemn oath and says that he has heard read, the foregoing Bill of Complaint, and knows the contents thereof, and, that the same is true of his own knowledge except as to the matters therein stated upon information or belief, and, as to those matters he believes it to be true.

AUGUST FERDINAND KRUEGER.

Subscribed and sworn to before me at and in said City and County of San Francisco, State of California, on this 29th day of July, 1915.

[Seal] MARTIN ARONSOHN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jul. 29, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [16]

*In the District Court of the United States, in and
for the Northern District of the State of Cali-
fornia, Second Division.*

AUGUST FERDINAND KRUEGER (Otherwise
Kruger) as Administrator of the Estate of
ANNA MARIA KRUEGER (Otherwise Kru-
ger), Deceased,

Plaintiff,

vs.

FREDERICK EGGERS, as Sheriff of the City and
County of San Francisco, California; SO-
PHIE SUTER, as Executrix of the Will of
DANIEL SUTER, Deceased; SOPHIE SU-
TER; OTTO TUM SUDEN, EDWARD C.
HARRISON, MAURICE E. HARRISON,

Defendants.

Order to Show Cause and Restraining Order.

The plaintiff, in the above-entitled cause having commenced a suit in equity in the above-entitled court against the above-named defendants, and praying for an injunction against said defendants, requiring them to refrain from certain acts in the complaint on file in said action, and hereinafter more particularly mentioned;

NOW THEREFORE, on reading said Complaint, duly verified by the oath of the plaintiff, and it satisfactorily appearing to me that it is a proper case for an injunction to issue, and that sufficient grounds exist therefor;

IT IS ORDERED by me, a Judge of said Court, that said defendants, and each of them, do appear

before me on Monday, the 9th day of August, 1915, in the courtroom of the above-entitled court, general Postoffice Building, San Francisco, California, and show cause, if any they have, why said injunction should not issue;

AND IT IS FURTHER ORDERED that until the determination of this order to show cause, the said defendants and each of them and all their servants, attorneys, agents and assigns be and are hereby restrained from dispossessing said complainant and plaintiff herein from the property described in the said complaint, [17] situated in the City and County of San Francisco, California, and particularly described as follows, to wit:

Beginning at a point on the westerly line of Ninth Avenue, distant thereon 100 feet southerly from the southerly line of Clement street; running thence southerly along said westerly line of Ninth Avenue 75 feet; thence at a right angle westerly 120 feet; thence at a right angle northerly 25 feet; thence at a right angle westerly 120 feet to a point in the easterly line of Tenth Avenue; thence at right angles northerly and along said Tenth Avenue 50 feet; thence at a right angle easterly 182 feet and 6 inches; thence at a right angle northerly 100 feet to a point in the southerly line of Clement street 25 feet; thence at right angles easterly 32 feet and 6 inches to said western line of Ninth Avenue and the point of beginning.

Being part of Outside Land Block 190.

Let a true copy hereof be served on each of the defendants.

Dated this 30 day of July, 1915.

WM. W. MORROW,
Judge.

[Endorsed]: Filed Jul. 30, 1915, at 9:30 A. M. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [18]

31,401-15.

UNITED STATES FIDELITY AND GUARANTY
COMPANY.

Capital Paid in Cash \$2,000.000. Total Resources
over \$6,000,000.

HOME OFFICE.
BALTIMORE, MD.

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

AUGUST FERDINAND KRUEGER, as Adminis-
trator of the Estate of ANNA MARIA KRUE-
GER, Deceased,

Plaintiff,

vs.

FREDERICK EGGERS, Sheriff, et al.,

Defendants.

Undertaking of Interim Injunction.

Whereas, heretofore, to wit, on the 30th day of July, 1915, the above-entitled Court made an order in the above-entitled cause, *inter alia* to the effect that a preliminary injunction *pendente lite* be issued herein in favor of plaintiff and against these defendants restraining the defendants and *its* each of them, their

officers, agents, employees and servants from the commission of certain acts as in the aforesaid order filed herein is more particularly described.

NOW, THEREFORE, the undersigned the United States Fidelity and Guaranty Company, a corporation, having its principal place of business in the City of Baltimore, State of Maryland, and having a paid-up capital of not less than Two Million Dollars (\$2,000,000), duly incorporated under the laws of the State of Maryland for the purpose of making, guaranteeing and becoming surety on bonds and undertakings, and having complied with all [19] the requirements of the laws of the State of California respecting such corporation, in consideration of the premises and the issuing of the said injunction does hereby undertake in the sum of One Thousand and no/100 (\$1,000.00) Dollars and promise to the effect, that in case said injunction shall issue the said plaintiff will pay to the said parties or any party who may be found to be wrongfully enjoined or restrained thereby such damages not exceeding the sum of One Thousand and no/100 (\$1,000.00) Dollars as such party or parties aforesaid may sustain by reason of said injunction, if the said Court finally decide that the plaintiff was not entitled thereto.

Dated at San Francisco, California, this 31st day of July, 1915.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY,

[Seal]

By H. V. D. JOHNS,

By BRADLEY CARR,

Its Attorneys in fact.

[Endorsed]: Approved. Wm. W. Morrow, Circuit Judge. Filed Aug. 2, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

In the District Court of the United States, in and for the Northern District of the State of California, Second Division.

No. 197.—IN EQUITY.

AUGUST FERDINAND KRUEGER, *alias*, as Administrator, etc.,

Plaintiff,

vs.

FREDERICK EGGERS, Sheriff, etc., et al.,

Defendants.

Motion to Dismiss.

Sophie Suter, as executrix of the Will of Daniel Suter, deceased, and Sophie Suter, defendants herein, now move the Court to dismiss the plaintiff's bill filed in this cause, with the proceedings had thereon, for the following causes, viz.:

First. Because it appears from said bill that this defendant as such executrix has instituted as plaintiff in the Superior Court of the State of California, in and for the City and County of San Francisco, an action against said plaintiff herein as defendant therein, for the recovery of the possession of, and the quieting of her title to, all the property described in said bill herein, and said plaintiff never presented or filed any petition or application for the removal of said cause to this Court, but submitted himself to and accepted the jurisdiction of said

Superior Court, which jurisdiction effectually attached to said property, to the exclusion of the jurisdiction of this Court; in which action a judgment has been rendered against said plaintiff herein and in favor of this defendant, which judgment has never been vacated, reversed or modified, or appealed from, and is now final. [21]

Second. Because it appears that said plaintiff seeks by said bill to obtain an injunction to stay proceedings on the execution of a judgment of said Superior Court of the State of California, in contravention of the provisions of Sec. 265 of "The Judicial Code."

Third Because of insufficiency of fact shown by said bill to constitute a valid cause of action in equity.

August 4th, A. D. 1914.

EDWARD C. HARRISON,
MAURICE E. HARRISON,

Solicitors for Defendants Sophie Suter as Executrix
of the Will of Daniel Suter, Deceased, and
Sophie Suter.

[Endorsed]: Filed Aug. 4, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [22]

*In the District Court of the United States, in and
for the Northern District of the State of Cali-
fornia, Second Division.*

No. 197—IN EQUITY.

AUGUST FERDINAND KRUGEER, (*alias*), as
Administrator, etc.,

Plaintiff,

vs.

FREDERICK EGGERS, as Sheriff, etc., et al.,
Defendants.

**Affidavit of Edward C. Harrison in Response to Order
to Show Cause.**

State of California,

City and County of San Francisco,—ss.

Edward C. Harrison being duly sworn, deposes
and says:

I am one of the defendants in the above-entitled action and one of the attorneys therein for Sophie Suter, as executrix of the will of Daniel Suter, deceased, and Sophie Suter individually, also defendants in said action.

There is of record in the office of the county recorder of this City and County of San Francisco State of California, in Book 2068 of Deeds, at page 218, a deed recorded therein at the request of Daniel Suter on July 18th, 1904, the same being a deed bearing date on said 18th day of July, A. D. 1904, and made by B. P. Oliver as commissioner of the Superior Court of said City and County of San Francisco, in the action of foreclosure No. 82,815 in said

Superior Court mentioned and referred to in Paragraph VII of the plaintiff's bill herein, conveying to said Daniel Suter all the real property described in said plaintiff's [23] said bill, in and by which deed the said commissioner, as grantor therein, recites the sale by him, under and pursuant to the judgment and decree in said action No. 82,815, to said Daniel Suter on the 8th day of July, A. D. 1903, for the sum of \$5,550 in United States gold coin, of all said real property, and the payment of said sum to him by said Daniel Suter and the issuance of the usual certificate in duplicate of the said sale, and the expiration of the period of twelve months subsequent thereto without any redemption having been made;

On the 30th day of April, A. D. 1907, August Ferdinand Krueger, the said plaintiff herein, filed in said county recorder's office, a notice of ownership, wherein and whereby he gave notice that he was the owner of an interest in all said real property, and that the character of said interest was absolute and was obtained by him from J. J. O'Brien and Howard Havens, respectively, by purchase for valuable consideration by several deeds recorded in said county recorder's office respectively on June 12th, 1880, on February 8th, 1881, and on August 31st, 1886; and that said notice of ownership was recorded in said county recorder's office in Liber 2 of Notices of Ownership, at page 38. On March 30th, A. D. 1909, the said August Ferdinand Krueger, plaintiff herein, filed in said county recorder's office a written instrument entitled "Anna Maria Krueger, alias to August F. Krueger Affidavit,"

which instrument was signed by him, the said August Ferdinand Krueger, and in and by which he referred to said record of said Notice of Ownership for a description of said property, and in and by which he stated and made it known that he was in the actual possession and the owner and principal party in all transactions pertaining to said property. I am also one of the [24] attorneys for said Sophie Suter as executrix as aforesaid in the action of ejectment No. 50,766 in said Superior Court mentioned in the paragraph numbered XII of said Bill herein; and instituted said action on behalf of said Sophie Suter, executrix, as plaintiff, and managed and conducted said action and all proceedings therein on her behalf.

The said action of ejectment was begun on the 5th day of August, A. D. 1913; and the summons in said action was on the same day duly issued and duly served by the sheriff of said city and county upon the said August Ferdinand Krueger, the defendant therein, in the City and County of San Francisco. No answer or other appearance was made in said action by said Krueger within the time allowed by law therefor, and on and prior to the 21st day of August, A. D. 1913, said defendant was in default and the said executrix therein was entitled to have his default entered in said action; but because I believed, and still believe, the said Krueger to be mentally incompetent, and unable to take proper care of his own property interests, I did not feel justified in applying on said executrix' behalf for such default.

On the 22d day of August, A. D. 1913, the said

plaintiff served an answer made by him in person in said action, and I believe filed the same in said action. The said answer, in my opinion, stated, and states, no defense to the cause of action set out in the complaint in said action; and the said executrix was, after the filing of said answer, entitled to a judgment in her favor upon the pleadings in the cause. Because of my belief, however, aforesaid, that the said plaintiff was and is mentally incompetent, which belief was confirmed and strengthened by the contents of said answer, I did not feel justified in applying for such judgment on behalf of said executrix. Instead, I made application on [25] September 17th, 1913, to said Superior Court by petition, alleging the institution and pendency of the action, and the issuance and the service of the summons therein on said 5th day of August, A. D. 1913, and the executrix' belief of said Krueger's incompetency, and the fact that he had no general guardian, and the necessity for the appointment of a guardian *ad litem* to appear for and represent him and properly present his defense in said action, if he had any. Upon the presentation of the petition aforesaid, the said Superior Court duly made on said September 17th, A. D. 1913, its Order to Show Cause requiring the said plaintiff to appear before it in Department No. 8 thereof, on October 2d, A. D. 1913, at two o'clock P. M. of that day, then and there to show cause, if any he had, why said application should not be granted and a guardian *ad litem* appointed accordingly to appear for, and represent him in said action.

[On said 2d day of October, A. D. 1913, the said application came regularly on to be heard at the hour and place appointed, and proof was first made of the service by the sheriff of this City and County of San Francisco, upon said Krueger, of said Order to Show Cause as therein required; and after hearing had, it was then and there by said Superior Court found and adjudged, that said Krueger was an incompetent person, and, by reason of his unsoundness of mind, mentally incompetent to manage his property, that he had no general guardian, and that it was necessary that a guardian *ad litem* should be appointed to appear for and represent him and properly present his defense in said action; and upon such finding and adjudication, it was duly ordered that Otto tum Suden, Esq., an attorney at law of said Superior Court, be, and he was thereby, appointed guardian *ad litem* [26] of said Krueger to appear for and represent him, and present his defense in said action, and further ordered that said guardian *ad litem* should be allowed ten days' time from and after his receipt of a copy of his appointment and of a copy of the complaint therein, wherein and whereby to reply thereto on said Krueger's behalf.

The said guardian *ad litem* was thereafter duly served with the order last mentioned and with a copy of said complaint in said action. On the 9th day of October, A. D. 1913, the said guardian *ad litem* served upon me, said executrix' attorney, his answer to said complaint in said action, wherein and whereby he denied all the allegations of said com-

plaint and put said executrix to her proof of all such allegations; and thereafter said guardian *ad litem* served upon me his duly verified amendment to said answer, wherein and whereby he amended the same by the addition thereto of the defense of the statute of limitations;

The said action came regularly on for trial before the said Superior Court on the 9th day of December, A. D. 1913, upon the said complaint of the said executrix and the answer of said Krueger made on his behalf by his said guardian *ad litem*; and upon such trial I appeared as counsel for said executrix, and Mr. Otto tum Suden, the said guardian *ad litem*, appeared on his own behalf and on behalf of said Krueger. The said Krueger was present in person at such trial, and to the extent that he was mentally able to do so, participated in the same, and counseled with, and assisted his said guardian *ad litem* in his conduct of his defense to said action. He was offered as a witness on his own behalf, but because of his mental condition, was found by the said Superior Court incompetent to testify as a witness, and I was not permitted on executrix' behalf to examine him. [27] The said Krueger did not at the time of said trial or at any other time question the propriety of the Court's order appointing his said guardian *ad litem* or ask permission personally or through counsel to be separately represented or question the right or authority of his said guardian *ad litem* to appear for and represent him in said action. The said Krueger was so well and ably represented, and his defense so vigorously presented by his said

guardian *ad litem* that the Court was induced upon the trial of said action in what has seemed to me, and still seems to me, to be palpable error in its rendition of a judgment in favor of said Krueger; the Court finding that the defense of the statute of limitations was not sustained, and basing its conclusion in said Krueger's favor upon the proposition that the foreclosure sale under which the executrix claimed title was not valid.

Upon the trial of said action it appeared that the said Daniel Suter had derived his title under the said commissioner's deed hereinbefore mentioned and that the record in the foreclosure suit was destroyed in the fire of 1906.

Warner Temple, Esq., testified as a witness in said action on behalf of said Krueger, the defendant therein, that he had examined the record in the foreclosure suit whilst it was still in existence and just before the time to appeal from the judgment had expired, and upon such examination found that the decree recited an appearance on behalf of the defendant administrator of the estate of Anna Maria Krueger, deceased, and his filing of an answer; but that no such answer in fact was in the papers and had never been filed, and that the attorneys for that administrator had explained upon the hearing of a subsequent motion in that cause that the reason they had not filed the answer was because they did not have the money to pay the fees for filing the same; [28] and Mr. Temple testified further that he had the said defendant August F. Krueger substituted in the place of the former administrator as

administrator of the estate of Anna Maria Krueger, deceased, and on his behalf took an appeal from the judgment and also made a motion, more than six months after the entry of the decree and the sale thereunder, to vacate it and set it aside as void, for the reason that it recited the filing of an answer which has not in fact been filed.

Mr. George A. Clough, who appeared as one of the attorneys for the plaintiff in the foreclosure suit before mentioned, testified on said trial that Messrs. McGowan and Westlake, the attorneys for the estate of Anna Maria Krueger, deceased, served him with an answer on behalf of the administrator of her estate as defendant in that action, and appeared on his behalf, and participated in the trial of the action.

Mr. Temple testified further on said trial that he had taken his appeal from the judgment of foreclosure, before his motion to vacate the judgment for the reason stated was granted and an order made purporting to vacate and annul the judgment of foreclosure as void. No notice of intention to move for a new trial of said action in foreclosure was ever served or filed, and no application for relief under Section 473 of the Code of Civil Procedure was made within six months as thereby required; the only ground of the last-mentioned order being that the judgment was void because it recited an appearance by a defendant whose answer was not in fact on file.

From the facts briefly hereinabove stated, I was, as I have already said, perfectly convinced that the title of the plaintiff's testator was good and that she was entitled to the judgment in this action, and

that I could without difficulty reverse on appeal the judgment which has been ordered in his favor. [29]

Thereafter my motion for a new trial of said action was granted, as shown by the record therein. If it had not been granted and if my appeals from the judgment and from an order refusing to grant it had been unsuccessful, and the judgment in defendant's favor herein affirmed, the result would have been that I would have only been put to the trouble of acquiring whatever interest the defendant might have in the property by a sale thereof in probate, and the application of the proceeds of such sale to the payment of indebtedness due to the estate of Daniel Suter, deceased, and secured by the equitable mortgage represented by his purchase at the former foreclosure sale. Since the sale to said Daniel Suter under said decree of foreclosure, which sale was made as aforesaid on July 8th, 1903, the said Krueger has paid none of the taxes upon said property; but all said taxes have been paid by the said Daniel Suter, and since his death by his said executrix; portions of the property have been sold under foreclosure for street assessment liens and the redemptions therefrom necessarily made by said executrix; and the following is a true and correct statement of all the expenditures made by the said Daniel Suter and his estate in the purchase of said property and the payment of taxes and other charges and liens upon the same as far as I am able to state them from records and vouchers at my disposal (and not including any disbursements or expenditures unknown to me) with interest thereon at seven per cent. compounded annually, namely:

**[Statement of Expenditures Made by Daniel Suter
and His Estate.]**

1903.				
July 8.	Price paid at commissioner's sale,			\$5550.00
1915.				
Aug. 9.	Interest thereon for 12 years and 1 mo.			7016.86
1904.				
Apr. 30.	Taxes paid (estimated)	\$40.00		
	interest thereon for			
	11 years,			\$44.16
[30]				
1905.				
Apr. 30.	Taxes paid		50.00	
	Interest thereon			48.32
Nov. 27.	Taxes paid		25.30	
1906.				
Apr. 30.	" "		25.30	
	Interest on	\$50.60		42.39
Nov. 26.	" "		27.49	
1907.				
Apr. 29.	" "		27.49	
	" "	\$54.98		39.46
1908.				
Jan. 27.	" "		23.64	
Apr. 27.	" "		23.64	
	" "	\$47.28		27.42
1908.				
Nov. 30.	" "		34.15	
1909.				
Apr. 26.	" "		34.15	
	" "	\$68.30		34.15
Nov. 29.	" "		42.00	
1910.				
Apr. 25.	" "		42.00	
	" "	\$84.00		33.80
Nov. 28.	" "		52.00	
1911.				
Apr. 24.	" "		52.00	
	" "	\$104.00		32.31
Nov. 27.	" "		53.82	

1912.

Apr. 29.	"	"		53.82	
		"	"	\$107.67	24.17
Nov. 25.	"	"		83.87	
Apr. 24/13.	"	"		83.87	
		"	"	\$167.74	24.30
Nov. 24/13.	"	"		89.79	
Apr. 23/14.	"	"		89.79	
		"	"	\$179.58	12.57
Nov. 27/14.	"	"		91.68	
Apr. 16/15.	"	"		91.68	
Total taxes paid					1137.48
Total interest paid,					363.05
Street assessment redemptions					
	Dec. 3/13.	J. J. Dowling			955.60
			Interest thereon		112.60
	Mch. 9/14.	J. G. Harney			299.10
			Interest thereon		29.66
Compromise payment to Krueger June 12/14.					1500.00
[31]					
			Interest thereon		121.62
					<hr/>
					\$17085.97

I am informed and believe that the rate of interest upon the notes upon which judgment was given in favor of said Suter in said foreclosure suit was 8 per cent, per annum, compounded semi-annually. I have no certain personal knowledge of this, however, and have used the rate of seven per cent per annum, compounded annually, as one more nearly fair to an accurate ascertainment of what *would the* just debt of the Kruger Estate to the Suter Estate if the foreclosure sale should be deemed as set aside and the redemption permitted.

An official appraisement of said real property has been twice made by the appraisers appointed for the purpose of said Superior Court in the matter of the estate of Daniel Suter, deceased. The latter of these

appraisements was made on February 15, A. D. 1915, and in both of these appraisements the value of all the said real property was placed at the total sum of \$13,500.00. I have made inquiries of real estate brokers and others as to the price that can properly be realized upon a sale thereof; and from all the information that I have been able to obtain during the two years devoted to such inquiries I am of the opinion that it will not be possible to realize at or near this time any price therefor in excess of \$15,000.00.

Because, however, I believed, and still believe, that the interest of the estate of said Daniel Suter, deceased, would be best served by a settlement that would give said Krueger a large portion of any possible equity that he might have in said property,—
[32] the said estate having a very heavy indebtedness, some of which bears a very heavy rate of interest,—I offered, after a new trial of said action in ejectment had been granted by said Superior Court, to pay to the said guardian *ad litem* \$1000.00 by way of compromise. He would not accept this offer; and after some negotiations, we finally agreed upon \$1,500.00 as a fair sum to pay to the said Krueger by way of compromise of the controversy in said action. This compromise and the considerations and the inducements leading up to it were thereafter fully explained to the Hon. Geo. A. Sturtevant, the Judge who presided at the trial of said action and heard the testimony adduced upon such trial, and who made the said order appointing said guardian *ad litem*, and after such explanation he made, upon

the application of said guardian *ad litem*, an order approving the compromise so agreed upon, and I, on behalf of the executrix, paid to said guardian *ad litem*, to effect and consummate such compromise, the said sum of \$1500.00. The same is still retained by said guardian *ad litem*, and no offer or proposition has been made by him or on his behalf, or on behalf of said Krueger, to return the same or any part thereof to the executrix or to me. I believe the settlement made is one highly advantageous to said Krueger, and it is one that I would not have made if it had not been for the necessities aforesaid of the executrix and the estate represented by her.

After the aforesaid compromise had been consummated, to wit, on August 5th, A. D. 1914, I was served with a notice of motion, an order shortening time and accompanying affidavits, copies of all of which are as follows: [33]

*In the Superior Court of the City and County of
San Francisco, State of California.*

SOPHIE SUTER (as Executrix, etc.),

Plaintiff,

vs.

AUGUST F. KRUEGER,

Defendant,

Notice of Motion [in Superior Court for Order Setting Aside Waiver and Compromise of July 22, 1914, etc.].

To the above-named plaintiff and to Messrs. Edward C. and Maurice E. Harrison, her attorneys and to Otto tum Suden, Esq., heretofore purported to be appointed guardian *ad litem*:

You and each of you will please take notice, that on August 7, 1914 at 10 o'clock A. M., or as soon thereafter as counsel can be heard, the above-named defendant will move the Court for the following orders and each of them:

1. Setting aside the waiver and compromise of July 22, 1914, and the order authorizing same.

2. Setting aside the order authorizing a fee of \$250 to said purported guardian *ad litem*.

3. Setting aside the judgment for plaintiff made and entered July 11, 1914.

4. Setting aside the order of June 5, 1914, granting motion for new trial.

5. Setting aside the settlement of the bill of exceptions herein.

6. Discharging said purported guardian *ad litem*.

7. Discharging said purported guardian *ad litem*, *nunc pro tunc*, as of March 4, 1914.

8. Setting aside the finding that defendant was incompetent, of October 3, 1913.

9. Setting aside the waiver of a jury trial made by said [34] purported guardian *ad litem* on said July 11, 1914.

Said motions will be made upon the ground that

the said purported guardian *ad litem* had no authority to act for defendant or agree to said or any compromise, or waive any error, or waive jury trial, or admit away any of the rights of affiant; and on the further ground that said purported guardian *ad litem* had no authority to act after March 4, 1914, or to agree to the said bill of exceptions, or to receive notice of motion for new trial, or appear thereon, and on the further ground that the Court was not informed or if at all "informed," misadvised of the value of the lands affected by the so-called compromise, and on the further ground that the Court had no jurisdiction to make said orders, or any of them, and on the further ground that defendant is neither an infant nor insane, nor has been during the pendency of said action; and will be based on this notice of motion, the affidavits served and filed herewith and all the papers and records of said action.

ARTHUR CRANE,

Attorney for Defendant.

Good cause appearing therefor, it is ordered that the time for serving the foregoing notice be and is hereby shortened so that the same may be served this day.

August 5, 1914.

GEO. A. STURTEVANT,

Judge of the Superior Court. [35]

*In the Superior Court of the City and County of
San Francisco, State of California.*

No. 50,766.

SOPHIE SUTER (as Executrix, etc.),
Plaintiff,

vs.

AUGUST F. KRUEGER,
Defendant,

Affidavit of Defendant.

State of California,
City and County of San Francisco,—ss.

August F. Kreuger, being duly sworn, deposes and says: I am the defendant in the above-entitled action.

Heretofore, to wit, October 3, 1913, the above-entitled Court made an order purporting to appoint Otto tum Suden, Esq., guardian *ad litem* for me and on my behalf to defend said action.

Said appointment was made by the Court, upon the mistaken and wrongful allegation of plaintiff that I was “incompetent” and without any allegation or evidence of “infancy” or “insanity.”

On March 14, 1914, judgment was given in my favor on subject matter in said action, and I was so informed by said Otto tum Suden, but I paid him no fee for his services in said matter, because he had told me before that he did not expect a fee.

After hearing, as aforesaid, that judgment in said action had been given in my favor, I was advised and

believed that said purported guardianship *ad litem* was at an end.

I therefore did not examine the records of said action after said March 14, 1914 until after July 22, 1914. Had I not believed that said guardianship was at an end, I would have frequently examined the records during said period, to discover [36] what my purported guardian was assuming to do on my behalf.

I did not know until after said July 22, 1914, that my said purported guardian had on my behalf purported to agree to the correctness of the bill of exceptions proposed by plaintiff, or that a motion for new trial was pending, or that same was granted by the Court, or that a jury trial was waived, or that the Court gave Judgment for plaintiff on July 11, 1914, or that my purported guardian petitioned for leave to accept \$1,500 from plaintiff, to waive, on my behalf, the error of that judgment, or that the Court granted said petition, or that my said purported guardian paid himself a fee of \$250 out of said \$1,500, and all said acts were done without my knowledge or consent and I did not agree and do not agree to said or any compromise.

Affiant further alleges that his said purported guardian Otto tum Suden, Esq., never inquired, advised or conferred with, *or* him, as to the extent or the value of the lands surrendered by said compromise; that the market value of said lands was then and now is the sum of more than \$20,000; said lands were purchased by affiant in the year 1880 and he has been in possession thereof ever since.

Affiant is now and has at all times since, to wit the year 1903 been ready, able and willing to pay all lawful claims or demands on said lands and particularly the principal and interest to date of any and all liens or incumbrances thereon.

That the total of all said claims, liens and incumbrances did not then and does not now exceed the sum of \$8,000, or thereabouts, and if said amount were paid in full out of the value of said lands, affiant would still have a net interest of \$12,000 therein. Affiant is unwilling to compromise his said interest of \$12,000 for \$1,500 or for any other sum less than \$12,000. [37]

Affiant further alleges that he is not, and was not at any time since the commencement of this action, a minor or infant and that he is not, and never has been, insane.

AUGUST FERDINAND KRUEGER.

Subscribed and sworn to before me this 5th day of August, 1914.

[Seal]

J. J. KERRIGAN,

Notary Public in and for the City and County of San Francisco, State of California. [38]

*In the Superior Court of the City and County of
San Francisco, State of California.*

SOPHIE SUTER (as Executrix, etc.),

Plaintiff,

vs.

AUGUST KRUEGER,

Defendant.

Affidavit of L. H. Moise.

State of California,

City and County of San Francisco,—ss.

L. H. Moise, being duly sworn, deposes and says: I am an officer, to wit, the president of the Moise-Klinkner Co., having its factory and offices at 1212 Market Street in said city and county, and as such have been personally acquainted with the above-named defendant, August F. Krueger.

Said defendant has been employed by said Moise-Klinkner Co., for more than 15 years in a position requiring good common sense and ability and has given, and is still giving, satisfaction in said employment.

I have personally kept in touch with him during that period of time and have found him honest, sober, industrious and intelligent.

He has never exhibited any symptoms of insanity.

L. H. MOISE.

Subscribed and sworn to before me this 5th day of August, 1914.

[Seal]

A. J. NAGLE,

Notary Public in and for the City and County of San Francisco, State of California. **[39]**

On August 7th, A. D., 1914, the motion described in the foregoing notice was made in said Superior Court on behalf of said Krueger and was heard by the Court and submitted upon the foregoing affidavits of myself and said Otto tum Suden filed and read in opposition thereto. Thereafter on the 17th day of August, A. D., 1914, the said Superior Court

made and entered in its minutes an order denying said motion, a copy of which order is as follows:

**[Order of Superior Court Denying Motion for Order
Setting Aside Waiver and Compromise of July
22, 1914, etc.]**

Monday, August 17, 1914.

Present—Hon. GEO. A. STURTEVANT, and
Officers of the Court.

50,766.

SOPHIE SUTER, as Executrix, etc.,
vs.

AUGUST F. KRUEGER,

In this action defendant's motion for orders, (1) Setting aside the waiver and compromise of July 22, 1914, and the order authorizing same, (2) Setting aside the order authorizing a fee of \$250.00 to said purported guardian *ad litem*, (3) Setting aside the judgment for plaintiff made and entered July 11, 1914, (4) Setting aside the order of June 5, 1914, granting motion for new trial, (5) Setting aside the settlement of the Bill of Exceptions herein, (6) Discharging said purported guardian *ad litem*, (7) Discharging said purported guardian *ad litem, nunc pro tunc*, as of March 4, 1914, (8) Setting aside the finding that defendant was incompetent of October 4, 1913, (9) Setting aside the waiver of a jury trial made by said purported guardian *ad litem*, of said July 11, 1914, having been heretofore submitted to the Court for consideration and decision, and [40] the Court having now considered the same and being fully advised, it is ordered that said defendant's

motion be and the same is hereby denied.

Vol. 88 of Minutes, p. 243.

I believe the said Krueger to be mentally incompetent to take proper care of his property; and such was my belief at the time I made application for the appointment of a guardian *ad litem* to represent him. My belief in his mental incompetency is based upon personal interviews which I have had with him personally, upon his conduct in his neglect of what he claims to be his own interests in the property, in permitting the same to be sold for street assessments, in the manner of his occupation of the property, resulting in complaints concerning the same from the health department, and the contents of his answer on file in said action in said Superior Court, and upon his demeanor in the courtroom upon the trial of said action and his demeanor upon every occasion when I have seen him; and also from his inability to comprehend the value to him of the compromise made on his behalf and his attitude and conduct with reference thereto.

EDWARD C. HARRISON.

Subscribed and sworn to before me this 7th day of August, A. D. 1915.

[Seal]

ALICE SPENCER,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Aug. 16, 1915. Walter B. Mal-
ing, Clerk. [41]

[Deed—Commissioner to Daniel Suter.]

THIS INDENTURE, made the eighteenth day of July in the year of our Lord 1904, between B. P.

Oliver, a commissioner duly appointed by the Superior Court of the City and County of San Francisco, State of California, and in the action hereinafter mentioned, to make sale of the property hereinafter described, the party of the first part, and Daniel Suter, the party of the second part, WITNESSETH:

WHEREAS, in and by a certain judgment and decree, made and entered by the said Superior Court on the tenth day of June, 1903, in a certain action then pending in said court, wherein the Hibernia Savings & Loan Society was the plaintiff and John Farnum as administrator of the estate of Anna M. Krueger, deceased, et al., were the defendants, the number of the case being 82815, it was among other things ordered, adjudged and decreed that all and singular the mortgaged premises described in the complaint in said action and specifically described in said judgment and decree, should be sold at public auction by the said party of the first part, as such commissioner, in the maner required by law, and according to the course and practice of said court, that said sale be made for gold coin of the United States, in the said City and County of San Francisco, State of California between the hours of nine o'clock in the forenoon and five o'clock in the afternoon, on such date as the said commissioner should appoint; that any of the parties to the said action might become the purchaser at such sale; and that said commissioner should execute the usual certificate and deeds to the purchaser or purchasers, as required by law.

AND WHEREAS, the said commissioner did, at the hour of ten o'clock A. M. on the eighth day of July, 1903, after due public notice had been given, as required by the laws of this [42] State and the course and practice of said Court, duly sell at public auction, in the said City and County of San Francisco, State of California, agreeably to the said judgment or decree and the provisions of law, the premises in the said decree or judgment mentioned, at which sale the whole premises in said judgment or decree and hereinafter described were fairly struck off to Daniel Suter, the said party hereto of the second part for the sum of Fifty-five Hundred and Fifty Dollars, U. S. Gold Coin, *it* being the highest bidder, and that being the highest sum bid for the same.

And whereas, the said party of the second part thereupon paid to the said commissioner the said sum of money so bid by it.

And whereas, the said commissioner thereupon made and issued, the usual certificate in duplicate of the said sale in due form of law, delivered one thereof to the said purchaser and caused the other to be filed in the office of the county recorder of said City and County of San Francisco, State of California.

And Whereas, more than twelve months have elapsed since the date of said sale and no redemption has been made of the premises so sold as aforesaid, by or on behalf of the said judgment debtors, or on behalf of any other person.

Now, this Indenture Witnesseth: That the said

party of the first part, the said commissioner, in order to carry into effect the sale so made by him as aforesaid, in pursuance of said judgment and decree, and in conformity to the statute in such case made and provided, and also in consideration of the premises and said sum of Fifty-five Hundred Dollars (U. S. Gold Coin), so bid and paid by the said purchaser, said party of the second part, [43] the receipt whereof is hereby acknowledged, has granted, bargained sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said party of the second part and to *its* successors and assigns forever all those certain lands, pieces, or parcels of land situate, lying and being in the said City and County of San Francisco, State of California, and bounded and particularly described as follows, to wit:

First. Commencing at a point on the southerly line of Clement Street distant thereon thirty-two feet and six inches westerly from the westerly line of Ninth Avenue, running thence westerly along said southerly line of Clement Street twenty-five feet, thence at right angles southerly one hundred feet, thence at right angles easterly twenty-five feet, and thence at right angles northerly one hundred feet to the point of commencement.

Second. Commencing at a point on the easterly line of Tenth Avenue distant thereon one hundred feet southerly from the southerly line of Clement Street, running thence southerly along said easterly line of Tenth Avenue fifty feet, thence at right angles easterly one hundred and twenty feet, thence

at right angles northerly fifty feet, and thence at right angles westerly one hundred and twenty feet, to the point of commencement.

Third. Commencing at a point on the westerly line of Ninth Avenue, distant thereon one hundred feet southerly from the southerly line of Clement Street, running thence southerly along said westerly line of Ninth Avenue seventy-five feet, thence at right angles westerly one hundred and twenty feet, thence at right angles northerly seventy-five feet and thence at right angles easterly one hundred and twenty feet, to the point of commencement.

The same being portions of Outside Land Block Number One Hundred and Ninety. [44]

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To have and to hold, all and singular, the said premises hereby conveyed, or intended so to be, together with the appurtenances unto the said party of the second part, *its* successors and assigns forever.

IN WITNESS WHEREOF, the said party of the first part to these presents has hereunto set his hand and seal the day and year first above written.

B. P. OLIVER, (Seal)
Commissioner.

Signed, sealed and delivered in the presence of

State of California,

City and County of San Francisco,—ss.

On this 18th day of July in the year one thousand nine hundred and four, before me, Mathew Brady, a Notary Public in and for the said city and county residing therein, duly commissioned and sworn, personally appeared B. P. Oilver, the within-named commissioner, as in the annexed instrument stated, known to me to be the person described in and whose *named* is subscribed to the within instrument, and he acknowledged that he executed the same as such commissioner.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in said City and County of San Francisco, the day and year in this certificate first above written.

[Seal]

MATHEW BRADY,

Notary Public in and for the City and County of San Francisco, State of California.

A true copy of original recorded at the request of Daniel Suter, July 18, 1904, at 40 min. past 3 P. M.

[45]

EDMUND GODCHAUX,

County Recorder.

No. E. 1390. Fee, \$2.10. Fol. 16.

State of California,

City and County of San Francisco,—ss.

I Edmond Godchaux, County Recorder of the said city and county, do hereby certify that the annexed is a whole, true and correct copy of an original record, as will appear by reference to Book 2068, of

Deeds, page 218, now in my office, and that said copy has been compared with the original, and is a correct transcript therefrom.

Witness my hand and officeial seal the 27th day of June, A. D. 1914.

[Seal] EDMOND GODCHAUX,
Recorder in and for the City and County of San Francisco.

Per Geo. M. Schiller,
Deputy.

[Endorsed]: Filed Aug. 16, 1915. Walter B. Maling, Clerk. [46]

[Answer in Suter vs. Krueger in Superior Court.]

(Received Aug. 22, 1913. Edward C. Harrison.)

*In the Superior Court of the State of California,
in and for the City of San Francisco.*

Department 8.

ANSWER TO THE COMPLAINT OF SOPHIE
SUTER OF SAN FRANCISCO, EXECUTRIX
OF THE WILL OF DANIEL SUTER OF SAN
FRANCISCO, EDWARD AND MAURICE
HARRISON, ATTORNEYS.

No. 50,766, Ejection Suit.

August Ferdinand Krueger (Kruger),

Also, Aug. Ferd. Krueger, Administrator of the
Estate in State, Defendant.

August Ferdinand Krueger, in behalf of himself
and Title. And: In lawful possession of the prop-
erty described in Plaintiff's Summons of August 5th.
1913, in Block 190, Outside Lands, and numbered

(new numbers) 2, 3, 4, 23, 24, and 31. Six parcels or lots.

Declares herewith his right and demand for a legal account of the estate's indebtedness to Sophie Suter in plea and says, that he is, and always was a lawful holder of the land since its purchase in the years 1880-1881, from J. J. O'Brien and Howard Havens. That his, August Krueger's, principal interest consists in the remainder and the reimbursements for the alimentation of one Anna Maria Krueger, his mother, from Zurich, Switzerland, since her arrival in San Francisco in December, 1872 (Swiss Hotel, H. Sturzenegger) (on Commercial Street), entrusted to his care during her natural life, which ended in May, 1902, at the age of 91 years.

And claims that he is rightfully entitled to the proceeds by public sale after deducting the amount of the various small [47] loans, composing the note of \$1,950.00 to the Hibernia Bank, given on November 30, 1897, and of \$1,850.00 indebtedness to Daniel Suter of December 1st, 1897, in Second Mortgage Notes, Renewal.

August F. Krueger states under oath that no notice or parley with him personally has ever been had about the proceedings during and after judgment obtained in May, 1903, and when Daniel Suter, who paid the Hibernia Bank's claim, or \$2,224.10 (final account) in July, 1903, by his own free action, according to defendant's knowledge and belief, it barred defendant in getting the terms of redemption, for with his first (The Hibernia Bank's) and second mortgage tax bills, Daniel Suter enjoyed see-

ing his name appear in the Printed Block Books of this city, which are in every real estate agent's office.

That his first letter to defendant within ten years was on March 27th, 1913, and did in no way allude to the matter contained in the above suit No. 50,766, August 5th, 1913, in the Superior Court.

AUGUST FERDINAND KRUEGER,

Defendant.

San Francisco, August 21, 1913.

Subscribed and sworn to before me this 21st August, 1913.

[Seal]

J. J. KERRIGAN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Aug. 21, 1913. H. I. Mulcrevy, Clerk. By W. R. Castagnetto, Deputy Clerk.

[48]

State of California,

City and County of San Francisco.—ss.

I, H. I. Mulcrevy, County Clerk, at the City and County of San Francisco, State of California, and ex-officio Clerk of the Superior Court, in and for said city and county.

HEREBY CERTIFY, the foregoing to be a full, true and correct copy of the original answer in the above-entitled cause, filed in my office on the 21st day of August, A. D. 1913.

ATTEST my hand and seal of said court this 6th day of August, A. D. 1915.

[Seal]

H. I. MULCREVY,
Clerk.

By H. Brunner,
Deputy Clerk.

[Documentary Stamp.]

[Endorsed]: Filed Aug. 16, 1915. Walter B. Mal-
ling, Clerk. [49]

**[Order Granting Motions to Dismiss as to E. C.
Harrison and M. E. Harrison and Denying the
Motions of the Other Defendants.]**

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

No. 197—IN EQUITY.

AUGUST FERDINAND KRUEGER (*alias*), as
Administrator,

Plaintiff,

vs.

FREDERICK EGGERS, Sheriff etc., et al.,
Defendants.

M. H. FARRAR, Esq., and WARNER TEM-
PLE, Esq., Attorneys for Plaintiff.

EDWARD C. HARRISON, Esq., and MAU-
RICE E. HARRISON, Esq., Appearing in
Person.

Ordered that of the various motions to dismiss
herein, the motion of Edward C. Harrison and
Maurice E. Harrison be granted, and the motions

of the other defendants be denied.

August 19th, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Aug. 19, 1915. W. B. Maling,
Clerk. J. A. Schaertzer, Deputy Clerk. [50]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 197—IN EQUITY.

AUGUST FERDINAND KRUEGER (*alias* KRUE-
GER), as Administrator, etc.,
Plaintiff,

vs.

FREDERICK EGGERS, Sheriff etc., SOPHIE
SUTER, Executrix etc., et al.,
Defendants.

**Counter-Affidavit in Reply to Affidavit of Edward
C. Harrison.**

City and County of San Francisco,
State of California,—ss.

Warner Temple, being first sworn, says:

I am a duly admitted attorney and counsellor at
law, practicing my profession in said City and
County of San Francisco now and for 20 years last
past, and upwards.

2.

I first became acquainted with the above-named
plaintiff in the month of May, A. D. 1904, when he
called at my office and asked me to help him redeem

the property hereinafter described, which, he said, had been sold under a decree of foreclosure of mortgage by his deceased mother executed in favor of the Hibernia Savings & Loan Society, a corporation; and hereinafter for brevity's sake, referred to as the "Hibernia Bank." Thereupon, I searched the papers on file in the action #82,815 by said Hibernia Bank, against John Farnham, as administrator of said Anna Maria Krueger, alias Kruger, deceased, the said Daniel Suter and one Gamage, the said Daniel Suter being a second mortgagee and Gamage being a lien holder for a street assessment claim; [51] and I inspected and read all the documents then on file in said action in the county clerk's office and the judgment-roll. The said John Farnham at that time was public administrator and as such, without notice to this plaintiff, he had applied for and obtained letters of administration on the estate of the said Anna Maria Krueger, deceased, the owner of the mortgaged property, being the real estate hereinafter particularly described, and to which estate the said property then belonged, has ever since belonged and still belongs. From that search I found, and so told this plaintiff, as the fact was and is, that the said judgment of foreclosure (which bore date 10th June, 1903) was void for want of jurisdiction in the Court to make it and for defects apparent on the face of the judgment-roll itself; that there was no proof of service of the summons and complaint on the defendant John Farnham, nor any admission of service thereof either by him or by any one for him; nor was there any appearance in

said action by him or by any one for him; that the said Decree of foreclosure recited, amongst other things, that at the trial of said action, an answer by said John Farnham was read, and there was no answer by him, nor had any answer by said John Farnham, administrator, been filed in said foreclosure action at this time, about the end of May, A. D. 1904, when I inspected said papers on file in said foreclosure action, it being then upwards of ten months since the making and entering of said foreclosure decree, thereafter, without delay, on due petition to said Superior Court, in proceedings No. 27,450 (Probate), Department #9, this plaintiff was appointed administrator of the said estate of his said deceased mother, in the place and stead of the said John Farnham. [52]

3.

Immediately thereafter, in or about the month of May or early in the month of June, A. D. 1904, this plaintiff was substituted as defendant instead of said Farnham, and on behalf of this plaintiff I moved the said Superior Court in said action #82,815 to set aside the said foreclosure decree as void for want of jurisdiction and for defects apparent on the face of said judgment-roll in said action, and notice of said motion was duly served by me personally on both Messrs. Tobin & Tobin, as the attorneys of said Hibernia Bank, and on the said Daniel Suter. (Said Daniel Suter had filed an answer with cross-complaint alleging that certain moneys were due to him as 2d mortgagee and had the decree of foreclosure include his claim to be

enforced by sale also under said foreclosure Decree; but there was no proof of service or any admission of service of said answer and cross-complaint on the said John Farnham, administrator, or at all.) The said Daniel Suter alone appeared and opposed said motion; he was accompanied by Frank McGowan, who acted as atty. for the public administrator. The said Daniel Suter asked the Court for leave to file "*nunc pro tunc*" a document called an answer to the complaint in said foreclosure action, which was a mere general denial by John Farnham, unverified, and over my objection the Court, Hon. J. G. B. Hebbard, Judge, gave leave to file said answer "*nunc pro tunc*," as of the date of the trial and to be taken as the answer read in said foreclosure decree, I excepted to such ruling. The said Daniel Suter then opposed and the said Court denied my said motion to vacate said foreclosure judgment; to which decision I also excepted; and when the order was served and filed I gave notice of appeal therefrom. From what transpired in Court at the hearing of said motion to vacate it was shown that the reason why no answer had been filed by John [53] Farnham when he was the administrator of said deceased, and the defendant in said action, was because he refused to pay the county clerk's fee for filing the answer, as there was no money in the estate of said deceased Anna Maria Krueger.

4.

Thereafter, to support the said appeal from said order refusing to vacate said foreclosure decree I prepared and served a full bill of exceptions *setting*

on Messrs. Tobin & Tobin and the said Daniel Suter. Tobin & Tobin took no notice thereof; the said Daniel Suter suggested certain revisions, and the fair copy of said Bill of Exceptions including said revisions was finally appointed by the said J. C. B. Hebbard, J., to be settled by him on or about the 5th day of September, A. D. 1905. The said Daniel Suter and I attended the appointment; no one appeared on behalf of the Hibernia Bank; their legal representative told me they would take no part in it as the bank's debt had been fully paid. The said Judge carefully read the said Bill of Exceptions and then refused to sign it saying "it was useless to appeal—the foreclosure judgment must be vacated as he evidently had had no jurisdiction to make the decree; and in the presence of said Daniel Suter the said Judge directed me to move next day in his courtroom to set aside said decree; I did so, and moved that said judgment be set aside for want of jurisdiction to make it and for defects apparent on the judgment-roll itself. The said Daniel Suter was present and opposed. He also asked said judge to grant him a writ of possession. The said Judge denied said Suter's motion for writ of possession; and he granted said motion by me, and he made his order vacating said foreclosure decree for want of jurisdiction and for defects apparent on the judgment-roll. I drew up the said order, including the denial of the writ of possession, and served said [54] order on both Messrs. Tobin & Tobin and the said Daniel Suter, who gave admissions of service thereof by indorsement on said order; and I then

filed said order; and thereafter the county clerk as ex-officio clerk of said Superior Court, cancelled the said judgment on the judgment-roll by a note thereon of said order vacating it and said cancellation was also entered in the judgment book of said Superior Court in the volume in which the original foreclosure decree had been recorded; and said cancellation of said decree became thus part of the record in said action of #82,815.

5.

Thereafter, I requested said Tobin & Tobin to formally serve this plaintiff with copy of the original complaint in said action #82,815 and I offered to accept service of the summons and complaint but they declined to take any further steps on behalf of said bank because the said bank was no longer interested, having been paid. Nothing further transpired until after the great conflagration in April, A. D. 1906, which destroyed nearly all the public records in the City and County of San Francisco.

6.

Unfortunately the said conflagration destroyed the record herein of said action #82,815; and all my papers, books, office furniture and everything connected with the affairs of the said Anna Maria Krueger, deceased, and with reference to said estate were utterly destroyed. As soon as possible after that catastrophe I saw Mr. G. A. Clough, of the firm of Tobin & Tobin, and asked him to have restored the record in said action #82,815; he refused, as the said Hibernia Bank was no longer interested, having

been paid in full their claim against said estate of Anna Maria Krueger, deceased. I also saw the said Daniel Suter and asked him to [55] restore the record, so that I might on behalf of this plaintiff have the pleadings completed and the action properly tried and disposed of. He refused. I repeated these requests later on and in the month of November, 1808, I again pressed both Messrs. Tobin & Tobin and the said Daniel Suter to take steps to restore said record, both again refused; Krueger, i. e., this plaintiff, was too poor and impecunious to do so. During all this period this plaintiff remained in the undisturbed possession of said land of which the description is as follows:

“All those pieces or parcels of land situate, lying and being in the City and County of San Francisco, State of California;

First: -Commencing at a point on the southerly line of Clement Street, distant thereon 32 feet 6 inches from the westerly line of 9th Avenue, running thence westerly along said southerly line of Clement Street 25 feet, thence at right angles southerly 100 feet, thence at right angles easterly 25 feet; and thence at right angles northerly 100 feet to the point of commencement.

2d: Commencing at a point on the easterly line of 10th Avenue distant thereon 100 feet southerly from the southerly line of Clement Street running thence southerly along said easterly line of 10th Avenue 50 feet; thence at right angles easterly 120 feet; thence at right angles northerly 50 feet; and thence at right angles westerly 120 feet to the point

of commencement.

3d: Commencing at a point on the westerly line of 9th Avenue distant thereon 100 feet southerly from the southerly line of Clement Street, running thence southerly along said westerly line of 9th Avenue 75 feet; thence at right angles westerly 120 feet, thence at right angles northerly 75 feet; and thence at right angles easterly 120 feet to the point of commencement:

Being parts of Outside Land Block #190:

Together with the improvements thereon.

Said improvements consisted of two frame dwellings—in part of which this plaintiff resided and still resided—and same are distinguished as #311–315 Ninth Avenue, Richmond District, San Francisco.

7.

It was at my suggestion and for the purpose of preventing any person from taking a conveyance of said property except through and with the approval of the Court of Probate in proceedings #27,450 aforesaid that this plaintiff filed in the county recorder's [56] office, San Francisco, a Notice of Ownership; the said Daniel was alive then, residing and practicing in San Francisco, which he did continuously till he died in San Francisco on or about the 5th day of June, 1913.

8.

The said Daniel Suter, a lawyer and money-lender, was at all the times herein-named practicing before the San Francisco bar; he was well versed in the law of real property and land titles in California; he was constantly investing money on mortgages

of real estate in San Francisco, and was familiar with the laws relating to mortgages and foreclosures, and rights thereunder, that during all the times herein mentioned, and to the present time, this plaintiff has been peacefully residing on said property undisputed and undisturbed until the defendant Sophie Suter as executrix of the late Daniel Suter, her deceased husband, brought the said action in ejectment in the plaintiff's bill herein mentioned; but, at no time did the said Daniel Suter attempt, by any proceedings, in any way, to obtain possession of said real property, or try to oust this plaintiff individually or in his representative capacity as administrator, from the possession of said real property; furthermore, in the month of January, 1910, the said Daniel Suter wrote me a letter offering to buy the plaintiff's interest in said property for the sum of \$1750.00; I submitted this offer to plaintiff and he refused to entertain it.

9.

As the attorney for this plaintiff I had no information or knowledge of the delivery by the commissioner under said foreclosure decree of any deed by him to said Daniel Suter; and if he did execute and deliver any conveyance purporting to vest in said Daniel Suter title to said real estate it can be of no effect to [57] transfer the legal title, as the said Daniel Suter took the deed with full knowledge of the aforesaid motion to set aside the said foreclosure decree afterwards held void and after the said Court had denied the motion of said Daniel Suter for a writ of possession of said property.

Neither he nor anyone claiming under him, the said Sophie Suter, his executrix, nor anyone representing her, can be an innocent purchaser.

10.

In or about the year 1911 the said plaintiff herein caused to confer with me; he was, he told me, barely earning a living, and he did not wish to incur any expense for legal aid or advice.

11.

Referring to the action #50,760 in the Superior Court by said defendant Sophie Suter, as executrix, against this plaintiff, as an individual, I deny that said Krueger was or is either insane or incompetent—he is 65 years of age and has always managed his own affairs and business shrewdly; I assert that it is the fact that there is no *judg*—either of incompetency or insanity against this plaintiff; that it was not shown by any competent or expert testimony that this plaintiff was incompetent; nor was there any evidence to prove this plaintiff an incompetent person. I further say that the said Otto tum Suden, defendant herein, was suggested to the Court to be guardian *ad litem* for said Krueger by the defendants, Sophie Suter and Edward E. Harrison, her attorney; that nothing in the petition for appointment of guardian *ad litem* shows Otto tum Suden to be financially responsible; that the said Krueger did not need a guardian *ad litem* to defend him in said ejectment action, but only an honest attorney who would in good faith use his best endeavors properly to protect the rights and [58] interests of said Krueger; that said Krueger has ever since the said great conflagration been

in need of ready money; that when said action in ejectment was brought against him he was without means to employ counsel to defend him and that he sought the aid of the Court for legal aid.

12.

I knew nothing about the ejectment action *action* #50,760 by the present defendant Sophie Suter against the said A. F. Krueger, until a day or two before the trial on or about the 9th December, 1913; when the defendant Otto tum Suden called on me for information regarding the estate aforesaid and this plaintiff's interest therein; and the said O. tum Suden stated that Judge Sturtevant had appointed him to protect this plaintiff; I gave to said tum Suden the information that I had of my own knowledge regarding it and he served me with a subpoena and I testified at the trial at said date, viz., about 9th December, 1913, and testified in substance and effect set forth, in the preceding 5 pages of this affidavit; I deny, as alleged by defendant Edward C. Harrison on page 6, that the void foreclosure decree recited an appearance. I said it set forth that an answer had been filed by the aforesaid Farnham, but that no answer was on file. About 2 or 3 weeks, I think, thereafter, I read in "The Recorder" newspaper that said ejectment action was dismissed and defendant Sophie Suter ordered to pay this plaintiff's costs; I never knew anything about the so-called new or 2d trial, nor was I asked to testify thereat.

13.

By searching the proceedings in said action

#50,760 subsequent to said trial in December, 1913, I find that the judgment in this plaintiff's favor was set aside by consent; and that the reversal of said judgment ordered and instead thereof the judgment given and made for defendant Sophie Suter and against this plaintiff [59] was by consent of tum Suden by prearrangement with the defendant Sophie Suter and Edward C. Harrison, illegally as I understand the law to be, and without any just cause apparent, save for the opportunity of giving the said tum Suden by way of bribe, as it appears to me in the shape of a fee, the sum of \$250.00 and the surrender to said Sophie Suter for \$1,500.00 property worth upwards of \$18,000.00 and always increasing in value.

Referring further to pages 6 and 7 of the said affidavit by defendant Harrison I deny that I ever testified in said ejectment action that I had on behalf of this plaintiff appealed from the judgment in said foreclosure action #82,815; I did say that I served notice of appeal from Judge Hebbard's order refusing (in the first instance) to vacate and declare void said judgment. I never knew this plaintiff till several months after the time to appeal from said judgment had passed, and then he came to request help to redeem the property from the Hibernia Bank; I also deny that said G. A. Clough testified as in said Harrison's said affidavit is stated. I am informed, believe and therefore allege that it is the fact, before rendering judgment in or about December, 1913, in said ejectment action #50,760, that Judge Sturtevant required the testimony to be written up and

transcribed; and I crave leave to refer to said transcript when produced in confirmation of my statements and this denial.

13.

It is not true that this plaintiff has not paid the taxes on said property since the date of said foreclosure decree. He has on several occasions since then, even after said conflagration of April, 1905, shown me receipts for taxes paid by him as [60] administrator thereof. The said property has never been distributed and is still subject to the jurisdiction of said Court in Probate; and the estate is still liable for the expenses of administration, the funeral expenses of said Anna Maria Krueger, deceased; also for the commissions payable to the administrator and to me as his attorney under section 1616, 1618 and 1619 of the Code of Civil Procedure, which are a first claim against said estate by the law of this State. Said commissions alone, calculated on the present worth (\$18,000.00 at least) of said estate, amount to \$1,340.00 without adding what the said Probate Court may think proper to allow for extra services under sec. 1619 C. C. P., not a cent whereof has been paid though due and owing.

14.

Referring to page 8 et seq. of said Harrison's said affidavit my memory is that the total of the judgment costs and interest ordered to be raised was \$5,250.00 not \$5,550.00: the other figures there are but estimates for interest long barred and other payments also barred by statute; that the payments alleged to have been made are and were purely vol-

untary payments which are either barred by statute or which the defendant Sophie Suter is not entitled to claim.

15.

I further say that the purported copies of papers, orders, etc., set out at the end of said affidavit and covering 5 pages relating to proceedings subsequent to the illegal judgment in favor of said Sophie Suter in said ejectment action #50,760 are but a small part of all the papers in said action on file and of record therein; and I respectfully submit that an inspection by this Hon. Court of said record will show that the original and only valid judgment therein dismissed said action and ordered said Sophie Suter to pay this plaintiff's costs; that all subsequent proceedings therein were uncontested consent proceedings, illegally, [61] wrongfully and fraudulently obtained and consented to by the defendant Otto tum Suden in conspiracy with the defendants Sophie Suter and Edward C. Harrison to betray this plaintiff and defraud him of the said property; and that if any sale and purchase were desired honestly it is not the province of a guardian *ad litem* to do it; that any money payable to a defendant defending by a guardian *ad litem* should be paid into court to the credit of said defendant; that wrongfully and in fraud of this plaintiff said Otto tum Suden instead of protecting his ward has ruined him, so that he, Otto tum Suden, might pocket a fee of \$250.00 and that he has shown the worst instead of the utmost good faith in defending his ward.

16.

I have known the plaintiff herein for ten years

and upwards last past, having frequent conversations with him not only in business, but socially, and I say that at no time have I found him incompetent to attend to his business or his property, or insane, or otherwise unfit to take care of himself or property. He is well versed in reading, is expert in his business as a wood-engraver, knows the value of money and of real property; he has an equitable mind, is always willing to do what is just and right, he pays his way, defrauds no one, and does not try or wish to take from others what is not his own; that if plaintiff's manner is at all to be questioned it is because, perhaps, of his manner, which may at times be thought peculiar or eccentric; he is a foreigner of German-Swiss parents, having always lived with an elderly mother until her death at the age of 90 years and upwards, as I have understood, and not associating with his neighbors, but by keeping to himself. His chief difficulty is and has been want of money either to prosecute or defend his rights; as his trade of wood-engraving has been ruined by the photo-engraving process [62] of illustration. He cannot get regular employment, he is now 65 years of age, and he can only earn a precarious living, barely sufficient to buy his daily food, by taking odd jobs, at piece-work rates, which are low; and many days there is no work for him. He has decidedly shown his mental capacity and competency to take care of his property and interests by refusing to accept the pittance of \$1,250.00 instead of what the Probate Court will distribute to him as the heir of his mother, the said Anna Maria Krueger, deceased.

WARNER TEMPLE.

Subscribed and sworn this 14th day of August,
A. D. 1915, before me.

[Seal] MARTIN ARONSOHN,
Notary Public in and for said City and County of
San Francisco.

(Received copy of this affidavit 16 Aug., 1915.
Edward C. Harrison, Maurice E. Harrison, Attys.
for Defts. Suter and Harrison.)

[Endorsed]: Filed Aug. 16, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [63]

**[Order Granting Application for Injunction
Pendente Lite.]**

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 197—IN EQUITY.

AUGUST FERDINAND KRÜEGER (*alias*), as
Administrator, etc.,

Plaintiff,

vs.

FREDERICK EGGERS, Sheriff, etc., et al.,

Defendants.

M. H. FARRAR, Esq., and WARNER TEM-
PLE, Esq., Attorneys for Plaintiff,
EDWARD C. HARRISON, Esq., and MAU-
RICE E. HARRISON, Esq., Appearing in
Person.

The application of plaintiff for an injunction
pendente lite having been, upon due notice to the

defendants herein, argued and submitted to the Court, it is ordered that said application be granted, and that defendants be restrained as prayed for in the bill, until the trial and final determination of the cause.

M. T. DOOLING,
Judge.

August 19th, 1915.

[Endorsed]: Filed Aug. 19, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [64]

*In the District Court of the United States, for
the Northern District of California, Second
Division.*

NO. 197—IN EQUITY.

AUGUST FERDINAND KRUEGER, (*alias* KRUEGER), as Administrator of the Estate of ANNA MARIA KRUEGER (*alias* KRUEGER), Deceased,

Plaintiff,

vs.

FREDERICK EGGERS, Sheriff of the City and County of San Francisco, California; SOPHIE SUTER; SOPHIE SUTER, as Executrix of the Will of DANIEL SUTER, Deceased; and OTTO TUM SUDEN,

Defendants.

**Statement of the Evidence on Appeal from Order
and Interlocutory Decree Granting Injunction.**

Plaintiff's application for an injunction *pendente*

lite, and the order to show cause on such application, came regularly on for hearing on the 9th day of August, 1915, before the above-named Court, Messrs. Mercer H. Farrar and Warner Temple appearing for the plaintiff, and Messrs. Edward C. Harrison and Maurice E. Harrison appearing for the defendants, whereupon the said application and order to show cause were continued to the 16th day of August, 1915. On the said 16th day of August, 1915, the said application and order to show cause again came on for hearing, Messrs. Mercer H. Farrar and Warner Temple appearing as attorneys for the plaintiff, and Messrs. Edward C. Harrison and Maurice E. Harrison appearing as attorneys for the defendants.

The said application for an injunction *pendente lite* was opposed by said attorneys for the defendants, and the following evidence was thereupon adduced and admitted on said hearing:

There was admitted in evidence of the plaintiff the Bill of Complaint. [65]

There was admitted in evidence for the defendants the affidavit of Edward C. Harrison in Response to Order to Show Cause.

There was also admitted in evidence for the defendants, certified copies of the following papers and filed in a certain action in the Superior Court of the State of California, in and for the City and County of San Francisco, entitled "Sophie Suter, as Executrix of the Will of Daniel Suter, Deceased, Plaintiff, versus August F. Krueger, Defendant." Said papers and files in said action, so introduced in evidence, were as follows:

1. Notice of Motion, signed by Arthur Crane.
2. Affidavit of August F. Krueger, Defendant.
3. Affidavit of L. H. Moise.

Said papers so introduced in evidence were in the words as set forth in the affidavit of Edward C. Harrison in response to Order to Show Cause.

There was admitted in evidence for the defendants, a certified copy of a minute order, dated August 17, 1914, in said action in said Superior Court, which minute order is in the words set forth in the affidavit of Edward C. Harrison in response to Order to Show Cause.

There was admitted in evidence for the defendants the certified copy of the answer of the defendant, August F. Krueger, in said action in said Superior Court, entitled "Answer to Ejectment Suit."

There was admitted in evidence for the defendants the certified copy of the deed from B. P. Oliver as commissioner to Daniel Suter, dated July 18, 1904.

There was admitted in evidence for the defendants certain portions of the Bill of Complaint and Amended Bill of Complaint in an action brought by the plaintiff in this action, August F. [66] Krueger as administrator of the estate of Anna Maria Krueger, deceased, against the defendants in this action, in the District Court of the Northern District of California, and numbered 131 in Equity on the files of said last-named court. The said action number 131 in equity was brought to secure the same relief as sought in this action. The said Bill of Complaint was signed and verified by the plaintiff in this action; and the said Amended Bill of Complaint

was signed and verified by Warner Temple, as attorney for said plaintiff in this action.

The following are the parts of said Bill of Complaint in action No. 131 in Equity which were admitted in evidence for the defendants:

**[Bill of Complaint in Action No. 131 in Equity
(Part of).]**

“That the defendant Otto tum Suden was on October 2d, 1913, in form appointed guardian *ad litem* for the defendant in that certain action then pending therein, entitled ‘Sophie Suter, etc., vs. August Krueger, No. 50,766’; that as your orator is advised and alleges, said guardianship *ad litem* became and so was at an end as hereinafter set forth, but your orator alleges that said Otto tum Suden still claims to be and pretends to act as guardian *ad litem* of said defendant in said action.”

“That on or about August 10, 1913, a certain act of the legislature of California amending section 372 of the Code of Civil Procedure of said State, by its terms came into force and effect. Said section as so amended is in words and figures as follows, to wit:

‘When an infant, or an insane or incompetent person is a party, he must appear either by his general guardian or by a guardian *ad litem* appointed by the court in which the action is pending, in each case. A guardian *ad litem* may be appointed in any case, when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to represent the infant, insane, or incompetent person

in the action or proceeding, notwithstanding he may have a general guardian and may [67] have appeared by him.

The general guardian or guardian *ad litem* so appearing for any infant, or insane or incompetent person in any suit shall have power to compromise the same and to agree to the judgment to be entered therein for or against his ward, subject to the approval of the court in which such suit is pending.

“That plaintiff in said Superior Court action thereon applied to said Court to appoint a guardian *ad litem* under said section, for the defendant therein, and said court as aforesaid made an order purporting to appoint said Otto tum Suden guardian *ad litem* of said August F. Krueger, defendant in said action, on the ground of “Incompetency.”

(After referring to the compromise between the guardian *ad litem* and Sophie Suter, as executrix): “Thereon, without the knowledge or consent of your orator and assuming to set under said section 372 of the Code of Civil Procedure, said arrangement was made and approved by said Superior Court and said money received by said Otto tum Suden.”

The following are the parts of the Amended Bill of Complaint in action No. 131 in Equity which were admitted in evidence for the defendants:

[Amended Bill of Complaint in Action No. 131, in Equity (Part of).]

“In or about the month of November, A. D. 1897, there was due to said Daniel Suter, principal, on the

following promissory notes of your complainant's mother, merely:

1894 March 28 for \$250.00 at 8% per annum;

1894 Aug. 28 for \$200.00 at 9% per annum;

1896 Jan. 22 for \$300.00 at 9% per annum;

1896 Jan. 28 for \$300.00 at 9% per annum;

1896 Aug. 28 for \$250.00 at 9% per annum;

1896 Aug. 21 for \$300.00 at 8% per annum;

thus making a total of principal claimed as *due them* to the said Daniel Suter amounting to \$1,600.00.

On this amount the said Daniel Suter claimed the further sum of \$250.00 as due to him from your complainant's said mother, for principal; interest, [68] searching title, attorney's fees and costs amounting to \$250.00 more; and on this latter sum your said complainant's mother paid interest to the said Daniel Suter up to at least the 1st October, 1898, as receipts in your complainant's possession will clearly show; and your complainant craves leave to refer to said receipts when produced."

"To the best recollection, research, information and belief of your complainant, the said Daniel Suter, claimed to be a creditor against the estate of said deceased in respect of the promissory notes signed by said deceased on 20 November, 1897, and December 1st, 1907, for \$950.00 and \$900.00, respectively, on which he claimed that 96 months' arrears of interest at 10½ per cent per annum were due to him in addition to said principal sums."

"And on or about May 20th, A. D. 1903, trial of said foreclosure action was heard by Hon. J. C. B. Hebbard; and findings and decree were on or about

said date duly filed, and by said decree then given and made by said Judge it recited, *inter alia*, that said John Farnham had appeared and filed his answer in said action, whereas in truth and in fact as it subsequently was shown to said court and Judge, as hereinafter set forth, no answer by said John Farnham as such administrator as aforesaid or at all was filed because he refused to pay the requisite fee to the county clerk required by law on filing his answer in said action, because there was no money in said estate to pay a fee to anyone.

There was admitted in evidence for the defendants the duly certified reporter's transcript of the testimony taken at the trial of the action of "Sophie Suter, as Executrix, etc., Plaintiff, vs. August F. Krueger, Defendant."

The following is a summary of the proceedings taken and [69] the evidence adduced before the said Superior Court, at the said last-mentioned trial, as shown by said transcript of testimony:

[Summary of Proceedings and Evidence Before Superior Court.]

"The cause of Sophie Suter, as Executrix of the Will of Daniel Suter, deceased, versus August F. Krueger, came on for trial before the Superior Court of the State of California, in and for the City and County of San Francisco, on December 9, 1913, Edward C. Harrison appearing for said plaintiff therein, Sophie Suter, as executrix, and Otto tum Suden, Esq., appearing for himself as guardian *ad litem* of the defendant therein, August F. Krueger, and for said defendant August F. Krueger. The

said defendant therein, August F. Krueger, was also present.

“The plaintiff Sophie Suter, as executrix, offered, and there was admitted, in evidence the deed from B. P. Oliver, as commissioner, to Daniel Suter, dated July 18, 1904, which was offered in evidence in the hearing of the order to show cause in this cause. Plaintiff, Sophie Suter, as executrix, also offered, and there was admitted, in evidence two deeds from August F. Krueger to Anna Maria Krueger, conveying the property described in the bill of complaint in this cause, and executed by August F. Krueger. August F. Krueger was thereupon called as a witness for the plaintiff Sophie Suter, as executrix, but upon the objection of his guardian *ad litem*, Otto tum Suden, that he was incompetent to testify, he was examined by the Court as to competency, and held incompetent, and withdrawn as a witness.

“Plaintiff Sophie Suter, as executrix, thereupon rested.

“Warner Temple was sworn and testified as a witness for the defendant August F. Krueger in substance as follows:

“I am an attorney at law and have been for more than eighteen years in this city. I have known the defendant August F. Krueger for many years last past. I have been his attorney [70] since before the great fire of 1906. An action was brought by the Hibernia Savings and Loan Society to foreclose a mortgage against his deceased mother. The suit was brought against Mr. Farnham, as administrator of the decedent, and Daniel Suter was made a co-

defendant as second mortgagee. Mr. Krueger came to me and asked me if I would prepare an appeal; only five or six weeks remained with which to appeal from the judgment of foreclosure. Letters of Administration were thereupon issued to Mr. Krueger in the estate of Anna Maria Krueger, deceased, on May 20, 1904. I then applied to Judge Hebbard for leave to substitute Mr. Krueger as administrator in the place of Mr. Farnham. The order was made. When I became the attorney of Mr. Krueger and he had become a party to the action, I examined the record and I am pretty familiar with that record. There was in that record a complaint by the bank against Mr. Farnham, as administrator of the estate of Anna Maria Krueger, deceased. Also Mr. Suter was made a party defendant, on the ground of being a second mortgagee and there was a third party, a defendant who claimed to have a lien for some street or other work done. There *were* no pleading there on behalf of Mr. Farnham.

“Q. (by Mr. tum SUDEN.) Do you recollect whether or not any return of summons was made?

“A. That was one of the things missing.

“Q. Was there, or not?

“A. No, sir, there was no proper return.

“Q. What was there in the return of summons?

“A. This was the condition; the register would seem to show that some affidavit of service of summons had been made, and there was nothing in the papers to show it. [71]

“Q. Then there was no return?

“A. No, sir—There was some sort of affidavit.

What the affidavit was, I could not tell, because it was not there."

"Q. Was the original summons on file?

"A. No, sir.

"Q. Was there any return of summons on file?

"A. No, sir, I don't think there was.

"Q. Was there any answer on file on behalf of Mr. Farnham?

"A. None whatever. There was nothing whatever, either in the register or otherwise to show there was an answer.

"Continuing the same witness further testified substantially as follows: A judgment and decree was made; it recited the amount due to the bank and to Mr. Daniel Suter and it also recited that Mr. Farnham had appeared by counsel and filed an Answer. There was no answer on file. I then moved to set aside the decree, on the ground of defects apparent on the face of it, and for want of jurisdiction in the court to make the decree. I made this motion immediately after the appointment of Mr. Krueger as administrator. The decree recited, among other things, that Mr. Farnham had appeared and answered, and he never did—that was an oversight. Afterward, Mr. Suter came in and asked for liberty to file an answer for Mr. Farnham, *nunc pro tunc*, and he appeared in court for Mr McGowan, who used to be the attorney for Mr. Farnham, as public administrator, and tendered Judge Hebbard an unverified answer of general denial to a verified complaint, and asked that he be allowed to file it *nunc pro tunc*, and read as the answer in the decree

which I was objecting to. Over my objection, Judge Hebbard made the order, *nunc pro tunc*. As that was an order made after judgment, it was an appealable order and within the time limited by the code, I perfected an appeal on behalf [72] of Mr. Krueger against that order and prepared a bill of exceptions, and that bill of exceptions I served on Mr. Suter and on Mr. Clough about August, 1905, and after Judge Hebbard returned from his vacation, an appointment to settle the bill of exceptions was made. I had purposely seen Mr. Clough, and he told me the bank had been paid by Mr. Suter, and he took no further interest in it, and he didn't appear on the settlement of the bill of exceptions. Mr. Suter appeared, and at the same time, on September 5, 1905, the Court was asked to settle the bill of exceptions, Mr. Suter interjected a motion for leave, or for the Court to grant a writ of possession to take the property. The judge said he would read the bill of exceptions first. After reading the bill of exceptions, he said 'Mr. Suter, it is evident that there was a great miscarriage of justice here, and that I have been misled by the decree that was prepared. Mr. Farnham never appeared in the action and there never was any answer filed. We can't go before the Supreme Court with a thing like this. I shall allow the thing to be set aside, and grant a motion for a new trial.'

"Q. Was Mr. Suter present when the order was made? A. Yes, sir, certainly.

"Q. What was said at that time in the presence of Mr. Suter?

“A. When the Judge said he was satisfied that, as Mr. Farnham had not filed any answer, and we produced to the court the reason he had not filed any answer, there were no assets in the estate and Mr. Farnham would not put up the fee to file the answer, and the county clerk would not file the answer when he was not paid his fee, so there never was any answer filed. So the Judge said ‘It is evident that I was misled,’ everything was [73] regular, but that he had signed the decree apparently without reading it carefully, but on reading the bill of exceptions he said ‘I am perfectly satisfied that I had no jurisdiction to make the decree, and, if you will renew your motion, Mr. Temple, to vacate the decree, I will grant it.’ Accordingly I did renew my motion to set aside the decree and the Judge granted my motion to set aside the decree and refused Mr. Suter’s motion for a writ of possession.

“WITNESS.—I prepared the order and the Judge signed it.

“Q. What did Mr. Suter say to this?

“A. Mr. Suter was present when I renewed the motion before Judge Hebbard and Judge Hebbard made the order, and Mr. Suter never appealed from it.

“On cross-examination the same witness testified in substance:

“Nearly a year, a year all *of* but six weeks, had expired after the judgment in the foreclosure suit before Mr. Krueger came to me. The judgment was rendered on or about June 16, 1903. Mr. Krueger first called on me a few days before May 14, 1904,

when I got the letters of administration. I could not make out from Mr. Krueger what were the facts and I said 'Come back to-morrow and meanwhile I will go out to the county clerk's office and search.' and I carefully read over the whole proceedings in the case of Hibernia Savings and Loan Society against Farnham, administrator of the estate of Anna Maria Krueger, deceased. In those proceedings Mr. Oliver was appointed a commissioner. He had given Mr. Suter a certificate of sale and his report of the sale was on file with the judgment-roll and it showed that Mr. Suter had paid the bank. It showed that he paid the commissioner [74] the price for the property, and bought it for \$5,000 and some odd dollars.

"Q. When you looked at the register, I think you said you saw there was a paper filed of the service of the summons?

"A. Yes, sir, that was against a man who had some interest as a lienholder for sewer work, or something of that sort.

"Q. Did you look at the affidavit itself?

"A. Well, I wanted to see the affidavit, and I could not find it. The register showed that the summons was returned with an affidavit of service, but I was not able to find the affidavit, so I don't know what it contained with reference to the service actually made, I read the decree of foreclosure among the papers and it recited that the action came regularly on for trial upon the complaint of the plaintiff and the answer of the defendant Farnham as administrator of the estate of Anna Maria Krueger, and that the defend-

ant Farnham appeared by his attorneys. It recited the appearance of counsel for defendant Farnham on the trial, to the best of my recollection. I first made my motion to vacate the judgment the same day I got Mr. Krueger appointed administrator of his mother's estate, or the next day. I first had him substituted as defendant in the case. I then filed a motion of appeal from the judgment, and gave \$300 bond. I made the motion to vacate the judgment before I served the notice of appeal. In my moving papers I stated the ground of the motion to be for defects apparent on the face of the decree, because it recited that Mr. Farnham appeared and filed his answer, and there was no answer filed. That was the ground of my motion. First of all, when I came around, the Judge granted it. Then Mr. Suter came the next day and asked the Judge to set aside the [75] order granting it, he stating by affidavit that he was living at Sausalito, and he had been delayed by the fog. He said his steamer could not bring him across in time to reach the court, so he asked the order setting aside the decree and the motion reheard. Then the Judge made the order, and the motion was reheard, and then when it was reheard, Mr. Suter, appeared, and Mr. McGowan came with him, and brought an unverified answer by Farnham as administrator, simply a general denial of the complaint, and asked that it be served *nunc pro tunc*, and I objected to that and Judge Hebbard, over my objection, made the order, and I appealed from that order. I can't recollect whether Mr. McGowan told me that they had served the answer or not, but as a

matter of fact they had not filed it. That was on May, 14, 1904, about eleven months after the decree.

“Defendant thereupon rested.

“Plaintiff Sophie Suter, as executrix, thereupon called George A. Clough, who was duly sworn and testified substantially as follows: I am and have been for many years an attorney at law practicing in San Francisco, and one of the attorneys and counsel for the Hibernia Savings & Loan Society. In the year 1902, I instituted an action of foreclosure on behalf of the Hibernia Savings & Loan Society against the estate of Anna Maria Krueger, deceased, on her mortgage to the bank. The record of that action has been destroyed. I do not recall who the defendants were in that action other than the estate of Anna Maria Krueger and I think Mr. Farnham was the administrator. I have no independent recollection as to whether or not the summons was served in that action. I have an office record of it which I have consulted. It is my impression that the record shows that the summons was returned and filed. I was personally present at [76] the trial of that action. Mr. Farnham’s attorneys in that action were McGowan & Westlake, I think. Mr. McGowan and Mr. Westlake participated. They served me with an answer on behalf of the defendant Farnham as administrator in the case. On the trial of the action my recollection is that Mr. McGowan and Mr. Westlake were both there appearing on behalf of the defendant Farnham as administrator, and that Mr. McGowan conducted the trial. There was a trial

there. The best of my recollection is that the decree recited the appearance of Mr. McGowan and Mr. Westlake as attorneys for the defendant Farnham. That is our practice. I don't have any independent recollection of the fact in that case but that would be my testimony from the best of my recollection, but I do remember the fact that Mr. McGowan was there and I think Mr. Westlake. We have a printed form of decree which has the blanks prepared for these recitals, showing the pleadings that were filed on behalf of the defendants and the name or names of counsel that appeared. That is, a blank is left in the printed form for the name of counsel.

“On cross-examination, the said witness, George A. Clough, testified substantially as follows: I haven't any recollection as to whether the answer was served on me.

“Q. What I want to know is, what you personally know about it. Mr. Clough, you did not receive any answer, as far as you know?

“A. I didn't receive it—the best of my recollection will be this: I will testify that I examined the answer, a copy of the answer, as among our office files.

“Q. Is it not the fact that the judgment went *pro forma* by default, substantially?

“A. It seems more or less like a situation—I haven't any [77] independent recollection, but it may have been brought about by something else, but very frequently they are just general denials.

“Q. In other words, those things go as a matter of form?

“A. Usually, although it very frequently happens that people do—

“Q. (Interruptingly.) You have a set form of decree which you simply fill out, which recites whether or not an answer has been filed, and you assume that the answer had been actually filed?

“A. No, sir, I don’t assume anything of the kind.

“Q. What do you go on?

“A. At the time I assumed that—

“Q. Yes—

“A. Yes, sir, at the time; that is the only explanation of the recitals in the decree. It was never brought to our attention until some months later, when Mr. Temple appeared in the case, that no answer had been filed. Of course, Mr. McGowan and Mr. Westlake having appeared at the trial, and it having been served upon us, we prepared our decree upon the assumption that it had been filed.

“I do not know what the answer contained, by way of defense. I examined the answer, a copy of the answer, as among our office files. At the time the decree was prepared I assumed that the answer had been filed. It was never brought to our attention until some months later, when Mr. Temple appeared in the case, that no answer had been filed. Of course, Mr. McGowan and Mr. Westlake having appeared on the trial, and it having been served upon us, we prepared our decree upon the assumption that [78] it had been filed. Mr. Suter purchased at the sale. I have a clear recollection as to the appearance of Mr. McGowan in the case. There were some questions asked by him, more particularly with reference to Mr. Suter’s mortgage. I don’t think there was any question made as to the amount due

upon our mortgage, and I don't remember that there was any contest of that at all, but I think there were some *question* asked, or some little trial of a few minutes, and I think concerning Mr. Suter's second mortgage. This was a very unusual case, for the reason that Mr. Krueger appeared at our office very frequently, and made very long visits, and the matter was impressed upon my mind more than usual by reason of that fact, and by reason of the fact that within probably a year and a half after the foreclosure, Mr. Temple appeared in the case and endeavored to get the decree set aside, and served upon us very voluminous records in the case, all of which served to carry along in my mind the facts of the case.

“Plaintiff Sophie Suter, as executrix, thereupon rested and the cause was argued and submitted to the Court.”

There was admitted in evidence for the plaintiff in reply the affidavit of Warner Temple in reply to affidavit of Edward C. Harrison.

Plaintiff thereupon offered in evidence, and there *was* received in evidence, the following papers and files in the said action of “Sophie Suter, as executrix, vs. August F. Krueger”:

1. A petition of guardian *ad litem*, filed in said last mentioned cause July 22, 1914, and which is as follows:

THE COURT OF CHANCERY,
COUNTY OF ALBANY, NEW YORK.

**[Petition of Guardian Ad Litem in Suter v. Krueger
in Superior Court.]**

“(Title of Court and Cause.)

To the Honorable Superior Court of the City and
County of San Francisco, State of California.

The petition of Otto tum Suden, guardian *ad litem* of the [79] defendant August F. Krueger respectfully represents:

1.

That judgment in favor of the plaintiff herein as prayed for has heretofore been duly given, made and entered in the above-entitled action;

2.

That your petitioner is the guardian *ad litem* of the defendant August F. Krueger herein, duly appointed by order of this Court; that said defendant Krueger is without means with which to carry on an appeal in the said action or to further defend or prosecute the same;

3.

That Sophie Suter the plaintiff herein has offered to the defendant herein and has deposited with this petitioner as guardian *ad litem*, the sum of Fifteen Hundred Dollars (\$1,500.00) gold coin of the United States, for a waiver of all errors and of the right to appeal from the judgment made and entered therein, in her favor; that this petitioner respectfully suggests that it is for the best interest of the defendant Krueger that said offer be accepted, and that he be authorized by this Court to waive all errors and right of appeal on the behalf of defendant Krueger

herein for the reason as above stated, that said Krueger is wholly without means with which to make an appeal, or to bear the expense thereof, and that he has no means of raising the necessary funds for that purpose; that the amount required therefor would be not less than the sum of Two Hundred and Fifty Dollars (\$250) and that this petitioner knows of no way or method of obtaining said sum for said Krueger, and that he does not feel justified in advancing said sum for said Krueger there being no assurance whatever that the appeal would be successful, or defendant would [80] ultimately prevail in the case;

That for these reasons the undersigned petitioner respectfully submits that it is advisable and for the best interest of defendant herein that the offer of said plaintiff Sophie Suter be accepted, and that he be authorized to execute such waiver of errors and all right of appeal.

WHEREFORE your petitioner prays that an order be made authorizing this petitioner for and on behalf of the said defendant herein and as his guardian *ad litem* to execute such waiver of appeal and of errors, or that such further and other order be made as to this Court may seem fit and proper.

Respectfully submitted,

OTTO tum SUDEN,

Guardian *ad litem*."

2. An order to compromise, filed July 22, 1914, which is as follows:

“(Title of Court and Cause.)

Order to Compromise [in Superior Court].

Otto tum Suden, the duly appointed, qualified and acting guardian *ad litem* of the defendant August F. Krueger in the above-entitled action having filed herein his petition praying for authority to compromise and settle the controversy herein for and in consideration of the sum of Fifteen Hundred Dollars (\$1500.00) to be paid by the plaintiff to the defendant upon the condition that defendant waive error and right of appeal therein;

AND IT NOW APPEARING to the Court that all the allegations of the petition of said guardian *ad litem* are true, and that it is for the best interest of the defendant that said offer of compromise be accepted. [81]

NOW THEREFORE it is by the Court ordered and adjudged that the said Otta tum Suden guardian *ad litem* be and he is hereby authorized to accept said offer of compromise and to execute a waiver of error and right of appeal herein upon the payment to him of the sum of Fifteen Hundred Dollars (\$1500.00) by the plaintiff in this action.

Dated July 22, 1914.

GEO A. STURTEVANT.

Judge of the Superior Court.”

3. An order, filed July 24, 1914, which is as follows:

[Order of Superior Court Allowing Guardian Ad Litem Compensation, etc.]

“(Title of Court and Cause.)

IT APPEARING HEREIN That the plaintiff in the above-entitled cause has paid to Otto tum Suden, Guardian *ad litem* of the defendant in the above-entitled cause, the sum of Fifteen Hundred Dollars (\$1500.00) for waiver of error and of right of appeal, and in compromise and settlement of the controversy involved in this action pursuant to order of this Court; that the said guardian now has and holds the said sum of Fifteen Hundred Dollars (\$1,500.00);

AND IT FURTHER APPEARING that the said guardian *ad litem* is entitled to a reasonable compensation for his services rendered in the above-entitled action; that the sum of Two Hundred and Fifty Dollars (\$250) is a reasonable sum to be allowed for such compensation;

NOW THEREFORE it is by this Court ordered that the said guardian *ad litem due paid* unto himself the said sum of Two Hundred and Fifty Dollars (\$250) as and for his compensation for his services rendered, and that he pay the remainder of said sum, to wit: The sum of Twelve Hundred and Fifty Dollars (\$250) unto [82] the defendant herein by depositing the same in the German Savings and Loan Society's Bank to the credit of the said August F. Krueger and subject to his order.

Dated July 24th, 1914.

GEO. A. STURTEVANT,
Judge of the Superior Court.

Recorded Book 72, page 453, July 24th, 1914.”

4. A Release of Errors and Waiver of Appeal, filed July 24, 1914, which is as follows:

“(Title of Court and Cause.)

**Release of Errors and Waiver of Appeal [in
Supreme Court].**

In consideration of the sum of Fifteen Hundred Dollars (\$1,500.00) paid by the above-named plaintiff to the undersigned guardian *ad litem* of the above-named defendant, under and pursuant to the order of compromise duly made herein by the above-named Court on the 22d day of July, A. D. 1914, the said defendant, and his said guardian *ad litem* do hereby waive appeal, and the right of appeal, from the order heretofore made herein granting said plaintiff's motion for a new trial of the above-entitled action and from the judgment heretofore rendered and entered in her favor, and against said defendant in said action; and hereby release any and all errors that may have occurred or been committed herein, in favor of said plaintiff and waive a new trial of said action, and all right to move therefor by reason of any such errors or otherwise.

San Francisco, Calif., July 23d, 1914.

AUGUST F. KREUGER,

By Otto tum Suden,

His Guardian *ad litem*.”

5. An affidavit of Otto tum Suden, filed August 7, 1914, [83] which is as follows:

[Affidavit of Otto tum Suden in Superior Court.]

“(Title of Court and Cause.)

State of California,

City and County of San Francisco,—ss.

Otto tum Suden, duly sworn, deposes: That sometime in the month of September, 1913, Mr. E. C. Harrison, plaintiff's attorney, inquired of affiant whether or not he would consent to act as an attorney *ad litem* in an action he had brought against a German living in the Richmond District to recover possession of certain real estate; that he had summons served on the defendant; that the defendant was in default and that he was justified in entering judgment, but that he had learned that the defendant *not competent*, and he did not want to do him an injustice inasmuch as he did not know whether or not he had some defense;

Thereafter in October, 1913, an order of this Court was served on affiant appointing him guardian *ad litem* of the defendant in this action, together with a copy of the complaint filed herein; that affiant called upon Mr. Harrison and was told by him that this was the case concerning which he had the conversation above detailed; affiant inspected the records and found that defendant was in default and that Mr. Harrison could have taken such default and have obtained judgment all regular and valid on its face; that thereafter he undertook an investigation of the facts of the case and visited the said Kreuger at his place of residence on Ninth Avenue near Clement Street. He found him living in an odd collection of

sheds, shacks and crazy-quilt house divided in many compartments evidently intended for rooms, but all of them unfinished and in a considerable state of dilapidation, the whole giving an impression of a superstructure of a wrecked ferry boat, the structure evidently being designed without [84] any plan and bearing every evidence of the vagary of the mind of its occupant. Affiant spent nearly the whole of a Sunday with defendant in an attempt to learn the facts of the case. Defendant is a German and so is affiant, and being able to talk his native language he finally succeeded in calming down the defendant who seemed excited and excitable when his mind was directed to the subject matter of this action and the proceeding actions out of which it grew. In the end defendant submitted to affiant such documents as he had relating to the matter in hand, all of which had been cut in places and pasted into one or more books at different pages so that it was very difficult to piece them out and get their contents. From this conversation and from the documents so submitted, affiant gathered that originally the Hibernia Savings and Loan Society had made a loan to defendant's mother, that thereafter Daniel Suter, deceased, had made a second loan all prior to 1904, this loan also being not made to defendant but to his mother who died prior to 1905, over whose estate he is administrator so far as can be learned, the records not having been restored. The interest on either of these mortgages does not seem to have been kept up, nor were any taxes paid, nor the various street assessments upon two of which judgment had been entered and the

property sold nearly a year prior to October, 1913, for amounts aggregating about Twelve Hundred Dollars (\$1,200.00), and from which sales redemption must be immediately made.

Mr. Suter in addition seems to have advanced various sums of money for the purpose of carrying the property along so that from all that affiant could gather the total indebtedness upon the property arising out of these mortgages, streets assessments, taxes and other advances would be close to Thirteen Thousand [85] Dollars (\$13,000).

It appears further that prior to 1905, the Hibernia Savings and Loan Society brought an action to foreclose its mortgage impleading Daniel Suter as second mortgagee. In that action judgment was made decreeing a foreclosure and a sale was had in due time and a commissioner's deed was issued. And it was to recover possession under this deed that the present action instituted by Mr. Harrison was brought. Pursuing his investigation further affiant found that according to the statement of Warner Temple, as attorney at law who had represented the defendant, there was a defect in the judgment of foreclosure in that it recited that defendant therein had filed an answer, whereas in truth and fact no answer had been filed, nor had his default been taken or entered, so that the question presented was whether or not plaintiff in this case could establish the validity of his deed by a proper judgment-roll, the burden of proving lack of such a roll, however, being on defendant and not on plaintiff, affiant however thinking that he might be of some service to

the defendant here who to him appeared absolutely incompetent to transact any business undertook the defense and on the trial of the case succeeded in defeating plaintiff's right of present possession because of the invalidity of the judgment-roll upon which the sale depended. The expenses of this trial in the way of witness fees were defrayed by affiant, the defendant being apparently wholly without means. On this trial the defendant was sworn as a witness. He was questioned by affiant as well as Mr. Harrison and the Court and from the answers which he gave and his conduct then and there on the witness-stand, the Court ruled that he was not a competent witness, and he was not permitted to testify for that reason.

Thereafter in due time plaintiff moved for a new trial and [86] prepared his bill of exceptions which is in all respects full, fair and correct, and then made the proposition to affiant that plaintiff was willing to pay to defendant herein a reasonable sum in full settlement and liquidation if affiant on behalf of defendant would consent to a new trial and judgment in favor of plaintiff and an waiver of appeal and error, all to be subject to the approval of the Court; that affiant found himself confronted with litigation, the further conduct of which would entail considerable expense and the outcome of which was exceedingly doubtful, for the present action involved only the present right of possession and did not determine the actual merits, so that even if defendant prevailed on the appeal, plaintiff would still be entitled to proceed in the matter of the ad-

ministration of Anna Krueger's estate by presentation of her claim, no notice to creditors having apparently been published, and by foreclosure of both mortgages or a recovery of all other moneys advanced in protecting the property.

It was further evident that defendant would not be permitted to act as administrator, his incompetency being patent so that this affiant did not under the circumstances feel justified to advance the necessary funds to continue this litigation and defendant had none to advance.

It appeared further upon an examination of the bill of exceptions that plaintiff's learned counsel had overlooked a most material and substantial point in the trial before this Court, the facts concerning which were fully covered by the evidence which was that the order of Judge Hebbard purporting to vacate the judgment of foreclosure was made after the appeal from the judgment of foreclosure had been perfected, thereby removing the case and the judgment from the control of the Court. [87]

If this point is good, and affiant believed it so to be, then the judgment of this Court in favor of defendant of course was erroneous and plaintiff would be entitled to possession and all the right of defendant in that event either individually or as administrator would have been at an end. Therefore affiant believed it to be decidedly to the advantage of defendant to obtain a compromise and settlement. After numerous consultations and various negotiations he obtained an offer of Fifteen Hundred Dollars (\$1,500.00). This offer he submitted to Mr. Kreuger

in the vain hope that some glimmer of reason would enable him to see its advantage, but said Kreuger absolutely failed to comprehend or understand the situation, his mind being able apparently to conceive and hold but one idea and that was that neither courts or the law nor anyone could take his land, he having so read in some old law book which affiant is informed he has been thumbing for years, which is printed in German, and which seems to expound law or hypothecae of ancient days. Thereupon affiant submitted the offer so made by Mr. Harrison to the Court with full explanation of the circumstances. In doing so a computation was made of the amount of debt resting upon the property and to which in any event in equity plaintiff herein would be entitled, and also the value of the property. It should not be overlooked that the plaintiff in this case prior to the trial thereof in order to preserve her rights was compelled to redeem his property from judicial sales in foreclosure of street assessments liens, and that she disbursed a sum exceeding Twelve Hundred Dollars (\$1,200.00) for that purpose as affiant is informed. Thus affiant calculated that the total amount of indebtedness was about Thirteen Thousand Five Hundred Dollars (\$13,500) and over. Affiant further made careful inquiries as to the value of [88] the property and found that its actual present market value did not exceed Sixteen Thousand Dollars, and that that amount could be obtained only if a buyer could be found willing to take it. That if it were forced upon the market Fourteen Thousand to Fifteen Thousand Dollars would be a big price, other

lots in the same block being offered from Eighteen Hundred and Fifty Dollars to Nineteen Hundred Dollars for a twenty-five foot frontage. The offer of plaintiff therefore was substantially the difference between its actual value and the amount due on it.

Affiant further desires to say that in all his negotiations with plaintiff and her attorney, he found her inclined to be fair, just and equitable and to deal with the defendant in a spirit of justice, and that under these circumstances affiant met her in the same spirit, and does not believe that it was incumbent upon him to ask for more than defendant was justly entitled to.

Thereafter upon petition to this Court an order was duly given and made permitting the compromise which was carried out and the money was paid to affiant and has been held by him ever since to be paid over to said Krueger pursuant to the order of the Court and as in the order specified. That affiant has notified said Krueger and has urged him to come with him to the German Savings and Loan Society to deposit the money; that he has failed to comply with the said request of affiant;

Affiant further avers that in his opinion said defendant is mentally incompetent verging on insanity; that he is unable to reason or to speak connectedly; that he rambles and seems to be in a constant daze; that he will answer no question directly and that the only way to get any information out of him is to get him to talk and let him go on talking;

Affiant further avers that the matter of fee has been never discussed with said Krueger, nor has this affiant stated that he did not expect a fee. It is true however that affiant did not expect to be as successful as he was;

Affiant further avers that said Krueger is not competent to make the affidavit he did in this matter in which he speaks of examining the records, and that he would have examined the records if he had not believed that the guardianship was at an end, for the reason that said Krueger whenever he has been served with summons in this action or any other action, as well as in the street assessments foreclosure actions, invariably allowed the judgments to go by default and paid no attention to summons or other citation under the fixed notion that the law and the courts could not take his property, it being so laid down in the old law book on which he pins his faith.

Similarly the allegation in defendant's affidavit that he is now and at all times since the year 1903, has been ready, able and willing to pay all claims and demands on said land, etc., is without any basis of fact, since said defendant is utterly without means and without money and has been so for many years past. The statement so made in said affidavit purporting to be defendant's statement is simply the language of the scrivener of said affidavit and is conclusive evidence of the lack of competence of said defendant and must have been made with full knowledge of its untruth on the part of the person who prepared said affidavit and caused said Krueger to sign it;

This affiant further avers that the defendant is by profession a wood engraver and is competent at his profession; that for a number of years last past he has been without steady employment; that at times he has worked for the Moise-Klinkner Company [90] at odd jobs and at other times for the Louis Roesch Company, a corporation of which affiant is a director and attorney; that the latter corporation employs said Krueger on piece work whenever wood engraving work is required, the demand for which at present is very small; that he has been so employed for the Louis Roesch Company numerous times during the last year, and therefore the affidavit of L. H. Moise that for fifteen years defendant was employed in a position requiring good common sense and ability, etc., if intended to mean that defendant has had a position and has been steadily employed by Moise-Klinkner Company is not true. His employment with said corporation has been at a small wage whenever any wood engraving work was required, said corporation taking advantage of said defendant's necessities in that respect.

This affiant further avers that the persons with whom said defendant comes in contact with the Louis Roesch Company, consider him mentally defective and dangerous, so much so that on August 5, 1914, and before this affiant had become aware of the employment of Arthur Crane, Esq., a Mr. Wilhelm, G. F. Heise, the accountant of the Louis Roesch Company called upon this affiant at his office and cautioned him to beware of said Krueger; that he was a dangerous man and liable to commit acts of violence,

absolutely not amenable to reason and that he labored under the impression that everybody was engaged in a conspiracy against him.

Affiant further avers that he is well acquainted with said Krueger and has had numerous occasions to observe him and his conduct; that in his opinion said Krueger is incompetent to transact business, to take care of his affairs, or to enter into any contract or engagement, that he is liable to be imposed upon by designing persons, and he lacks understanding and is irresponsible [91] and that he has been so ever since the commencement of this action.

OTTO tum SUDEN.

Subscribed and sworn to before me this 6th day of August, 1914.

[Seal]

CHARLES R. HOLTON,

Notary Public in and for the City and County of San Francisco, State of California.”

“6. That in the Superior Court action, in the City and County of San Francisco, Numbered 50,766, entitled, Sophie Suter as Executrix, etc. vs. August F. Krueger,—the judgment shows a complaint in ejectment, and the answer of defendant August F. Krueger, and the answer and amended answer of Otto tum Suden, as guardian *ad litem* of August F. Krueger; and findings of fact and conclusions of law in favor of said defendant, August F. Krueger, that Daniel Suter was not at, or prior to his death, the owner in fee simple or entitled to the possession of the land described in the said complaint, and that August F. Krueger is in the possession of said land and entitled to the possession

thereof, and that defendant does not unlawfully withhold or detain possession thereof from plaintiff; and, further, that defendant, August F. Krueger's claims and right to possession of said lot of land, are not without right or foundation, and said defendant, August F. Krueger, is entitled to the possession thereof; and a judgment in favor of defendant August F. Krueger for his costs was made and entered on March 4, 1914, in Judgment Book 50, page 210; that there is endorsed thereon the following, 'Plaintiff's motion for new trial granted. H. I. Mulcrevy, Clerk. By P. R. McMahon, D. C. C.'; and the certificate to such judgment-roll is dated March 4, 1914; also, in said judgment-roll, further findings of fact and conclusions of law in favor of the plaintiff [92] and against the defendant to the effect that said Daniel Suter was at and prior to the time of his death the owner in fee simple of, and title to the possession of, all said land, and that ever since his death the same has belonged to and constituted a part of his estate, and that said plaintiff was at the time of the commencement of the action, and still is, entitled to the possession thereof, on which findings a judgment and decree is made in favor of the plaintiff and against the defendant, August F. Krueger, for the recovery of the possession of the real property described in the complaint, which judgment is dated July 15, 1914, and is entered on July 15, 1914, in Judgment Book 72, at page 379, and the certificate to such judgment-roll is dated July 16, 1914."

The foregoing was all of the testimony introduced at the hearing of said application for a temporary

injunction and order to show cause.

The said application and order to show cause was thereupon submitted to the Court, and thereafter, on the 19th day of August, 1915, the said court made its order and interlocutory decree granting injunction *pendente lite*; to which order defendants excepted and do except.

[Order Settling Statement of Evidence.]

The foregoing is settled as a statement of the evidence on appeal from said last-mentioned order and interlocutory decree.

Dated October 20, A. D. 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Oct. 20, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [93]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

No. 197—IN EQUITY.

AUGUST FERDINAND KRUEGER (*alias* KRUEGER), as Administrator of the Estate of ANNA MARIA KRUEGER (*alias* KRUEGER), Deceased,

Plaintiff,

vs.

FREDERICK EGGERS, Sheriff of the City and County of San Francisco, California,

SOPHIE SUTER, SOPHIE SUTER, as
Executrix of the Will of DANIEL SUTER,
Deceased; and OTTO tum SUDEN,
Defendants.

Petition for Allowance of Appeal.

To the Honorable MAURICE T. DOOLING, Dis-
trict Judge, and Judge of the Above-named
Court:

Frederick Eggers, Sheriff of the City and County
of San Francisco, California, Sophie Suter, Sophie
Suter, as executrix of the will of Daniel Suter, de-
ceased, and Otto tum Suden, the defendants in the
above-entitled cause, being aggrieved by the order
and interlocutory decree granting an injunction,
rendered and entered in the above-entitled cause on
the 19th day of August, A. D. 1915, do hereby appeal
from said order and interlocutory decree to the Cir-
cuit Court of Appeals for the Ninth Circuit, for the
reasons set forth in the assignment of errors filed
herewith; and they pray that their appeal be allowed
and that citation be issued *and* provided by law, and
that a transcript of the record, proceedings and
documents, upon which said order and interlocutory
decree was based, duly authenticated, be sent to the
United States Circuit Court of Appeals for the
Ninth Circuit, under the rules of such court in such
cases made and [94] provded.

Your petitioners further pray that the proper
order be made relating to the required security to be
required of them.

Dated September 16, A. D. 1915.

EDWARD C. HARRISON,
MAURICE E. HARRISON,

Solicitors for Defendants Frederick Eggers, Sheriff
of the City and County of San Francisco, Cali-
fornia, Sophie Suter, and Sophie Suter, as Ex-
ecutrix of the Will of Daniel Suter, Deceased.

PETER tum SUDEN,
Solicitor for Defendant Otto tum Suden.

[Order Allowing Appeal.]

Appeal allowed upon giving bond as required by
law in the sum of \$300.00.

Dated September 16, A. D. 1915.

M. T. DOOLING,
District Judge.

[Endorsed]: Filed September 16, 1915. W. B.
Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[95]

*In the District Court of the United States, for the
Northern District of California, Northern Divi-
sion.*

No. 197—IN EQUITY.

AUGUST FERDINAND KRUEGER (*alias* KRUE-
GER), as Administrator of the Estate of
ANNA MARIA KRUEGER (*alias* KRUE-
GER), Deceased,

Plaintiff,

vs.

FREDERICK EGGERS, Sheriff of the City and
County of San Francisco, California;

SOPHIE SUTER, SOPHIE SUTER, as Executrix of the Will of DANIEL SUTER, Deceased; and OTTO TUM SUDEN,

Assignment of Errors.

Now comes Frederick Eggers, Sheriff of the City and County of San Francisco, California, Sophie Suter, Sophie Suter, as executrix of the will of Daniel Suter, deceased, and Otto tum Suden, the defendants in the above-entitled cause, and file the following assignment of errors upon which they will rely upon their prosecution of the appeal in the above-entitled cause, from the order and interlocutory decree made by this Honorable Court granting an injunction, on the 19th day of August, 1915.

I.

That the United States District Court for the Northern District of California, and Honorable M. T. Dooling, Judge thereof, erred in making the said order and interlocutory decree granting an injunction, inasmuch as the bill of complaint in this cause is without equity.

II.

That the said Court and Judge erred in making the said order and interlocutory decree, because the said injunction stays proceedings on the execution of a judgment of the Superior [96] Court of the State of California, in violation of the provisions of section 265 of the Judicial Code.

III.

That the said Court and Judge erred in making the said order and interlocutory decree, because the defendant, Sophie Suter, as executrix of the will of

Daniel Suter, deceased, instituted as plaintiff in the Superior Court of the State of California, in and for the Cty and County of San Francisco, an action against the plaintiff herein, for the recovery of the possession of, and the quieting of her title to, all the property described in the bill of complaint herein, and said plaintiff herein never presented or filed any petition or application for the removal of said cause to the said District Court, but submitted himself to, and accepted the jurisdiction of said Superior Court, which jurisdiction effectually attached to said property, to the exclusion of the jurisdiction of the said District Court; in which action a judgment has been rendered against said plaintiff herein and in favor of said defendant, Sophie Suter as such executrix, which judgment has never been vacated, reversed or modified, or appealed from, and is now final.

IV.

That the said Court and Judge erred in making said order and interlocutory decree, because in said action in said Superior Court, an order was duly made, after notice to said plaintiff herein, and after an opportunity given to him to be heard, adjudging and decreeing that said plaintiff herein was incompetent, and appointing a guardian *ad litem* of said plaintiff herein; and because said order adjudging said plaintiff herein incompetent, and appointing a guardian *ad litem*, was in all respects valid and binding upon plaintiff herein, and prevents [97] him from now complaining that he was or is competent, or that the judgment rendered in said action in said Superior Court is in any respect invalid.

V.

That the said Court and Judge erred in making said order and interlocutory decree, because in said action in said Superior Court, after the rendition of judgment therein in favor of Sophie Suter, one of the defendants herein, said plaintiff in this cause appeared personally and by Arthur Crane, Esq., an attorney at law, and wholly separate and apart from his said guardian *ad litem*, and on August 7, 1914, made a motion for the setting aside of the orders and judgment of which he complains in this action; that said motion was duly heard and plaintiff herein offered evidence in support thereof before said Superior Court, and after full hearing and argument the said motion was denied, and that such denial of said motion is a bar to the prosecution of this action.

VI.

That the said Court and Judge erred in making said order and interlocutory decree, because the bill of complaint is without equity, in that it shows the existence of an indebtedness secured by a valid mortgage on the property therein described, which the plaintiff herein does not offer to pay, but against which he seeks to quiet his title.

VII.

That the said Court and Judge erred in making said order and interlocutory decree, because the bill of complaint is without equity, in that said plaintiff herein had a plain, speedy and adequate remedy at law by motion in said action in said Superior Court.

VIII.

That the said Court and Judge erred in making the said order and interlocutory decree, because the bill of complaint is without equity, in that it does not show that the judgment in said action in said Superior Court was obtained by fraud.

IX.

That the said Court and Judge erred in making said order and interlocutory decree, because the judgment in the action of foreclosure referred to in the bill of complaint was not void on its face, in that it recited the appearance of the defendant therein, and the order vacating said judgment in foreclosure was invalid because made during the pendency of an appeal to the Supreme Court of California from said Superior Court, and therefore the judgment rendered in the action brought by the defendant, Sophie Suter as such executrix against plaintiff herein was proper and in accordance with the rights of the parties, and said plaintiff herein will not be damaged, or deprived of any right, by the enforcement thereof.

X.

That the said Court and Judge erred in making said order and interlocutory decree, because the judgment in the said action of foreclosure was rendered by a court which had jurisdiction of the parties and the subject matter, and after service of summons and the appearance of defendant therein by the service of an answer and the actual appearance of defendant's attorneys upon the trial, and therefore the order vacating said judgment as in

excess of jurisdiction was beyond the Court's jurisdiction and therefore the judgment rendered in said action between the defendant, Sophie Suter, as executrix, and said plaintiff herein, was proper, and said plaintiff herein will not be damaged, or deprived of any right, by the enforcement thereof. [99]

XI.

That the said Court and Judge erred in making said order and interlocutory decree, because the judgment rendered in said action between said plaintiff herein individually and said defendant, Sophie Suter, is binding upon said complainant as administrator of the estate of Anna Maria Kreuger, deceased.

XII.

That the said Court and Judge erred in making said order and interlocutory decree, because any interest that may be owned by said plaintiff herein in the property described in said complaint is subject to liens in favor of this defendant exceeding in value the total value of said property.

XIII.

That the said Court and Judge erred in making the said order and interlocutory decree, in that it does not provide for the giving of security by said plaintiff herein, and is an interlocutory order of injunction, and that it therefore violates Section 18 of an Act of Congress of October 15, 1914, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for Other Purposes."

XIV.

That the said Court and Judge erred in making said order and interlocutory decree, inasmuch as the bill of complaint is without equity in this; that it is nowhere therein alleged that the plaintiff herein is the owner of the property therein described, or any part thereof, or of any interest therein, and it is nowhere therein alleged that the said property, or any part thereof, or any interest therein, belongs or did at the commencement of this action belong to the estate of Anna Maria Kreuger, deceased. [100]

XV.

That the said Court and Judge erred in making said order and interlocutory decree, inasmuch as the bill of complaint is without equity, in that it is nowhere therein alleged what is the citizenship of the defendants herein, and it does not appear therefrom whether there is any diversity of citizenship between the parties to this cause, nor whether the said District Court had or has any jurisdiction of this cause.

XVI.

That the said Court and Judge erred in making the said order and interlocutory decree, in that it does not set forth the reasons for the issuance of the same, is not specific in terms and does not describe in reasonable detail the act or acts sought to be restrained, and that it therefore violates section 19 of the said Act of Congress of October 15, 1914.

WHEREFORE the appellants pray that said order and interlocutory decree be reversed and that said District Court for the Northern District of Cali-

fornia be ordered to enter a decree reversing its decision in said cause.

EDWARD C. HARRISON,
MAURICE E. HARRISON,

Solicitors for Appellants Sophie Suter and Sophie Suter, as Executrix of the Will of Daniel Suter, Deceased, and Frederick Eggers, Sheriff of the City and County of San Francisco, California.

PETER tum SUDEN,
Solicitor for Appellant Otto tum Suden.

[Endorsed]: Filed Sep. 16, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [101]

[Bond.]

KNOW ALL MEN BY THESE PRESENTS:

That we, Sophie Suter, Sophie Suter, as executrix of the will of Daniel Suter, deceased, Otto tum Suden and Frederick Eggers, Sheriff of the City and County of San Francisco, as principals, and Edward C. Harrison and William King, as sureties, are held and firmly bound unto August Ferdinand Krueger (otherwise Kruger), as administrator of the estate of Anna Maria Krueger (otherwise Kruger), deceased, in the full and just sum of Three Hundred Dollars (\$300.00), to be paid to the said August Ferdinand Kruger, his executors, administrators and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of September, in the year of our Lord one thousand nine hundred and fifteen.

WHEREAS, lately at a District Court of the

United States for the Northern District of California, in a suit depending in said court, between said August Ferdinand Krueger (otherwise Kruger), as administrator of the estate of Anna Maria Krueger (otherwise Kruger), deceased, as plaintiff, and said Sophie Suter, Sophie Suter, as executor of the will of Daniel Suter, deceased, Otto tum Suden, and Frederick Eggers, Sheriff of the City and County of San Francisco, California, as defendants, an order and interlocutory decree was rendered against said defendants, and the said defendants having obtained from said Court an order allowing an appeal to reverse said order and interlocutory decree in the aforesaid suit, and a citation directed to the said plaintiff and respondent, citing and admonishing him to be and appear at a United States Circuit Court of Appeals for [102] the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said defendants and appellants shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

SOPHIE SUTER,

SOPHIE SUTER,

Executrix of the Will of Daniel Suter, Deceased.

OTTO tum SUDEN,
FREDERICK EGGERS,

Sheriff of the City and County of San Francisco,
California.

EDWARD C. HARRISON,
WILLIAM KING.

State of California,
City and County of San Francisco,
United States of America,
Northern District of California,—ss.

Edward C. Harrison and William King, being
duly sworn, each for himself, deposes and says: That
he is a freeholder in said district, and is worth the
sum of Three Hundred Dollars, exclusive of prop-
erty exempt from execution, and over [103] and
above all debts and liabilities.

EDWARD C. HARRISON.
WILLIAM KING.

Subscribed and sworn to before me this 17th day
of September, A. D. 1915.

[Seal] ALICE SPENCER,
Notary Public in and for the City and County of San
Francisco, State of California.

State of California,
City and County of San Francisco,—ss.

On this seventeenth day of September, in the
year of our Lord one thousand nine hundred and
fifteen, before me, Alice Spencer, a notary public in
and for the said city and county, residing therein,
duly commissioned and sworn, personally appeared
Sophie Suter, Sophie Suter, as executrix of the will

of Daniel Suter, deceased, Otto tum Suden, Frederick Eggers, Edward C. Harrison and William King, known to me to be the persons described in, whose names are subscribed to, and who executed the within and annexed instrument, and they acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the said City and County of San Francisco, the day and year last above written.

[Seal] ALICE SPENCER,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires June 20th, 1919.

[Endorsed]: Form of bond and sufficiency of sureties approved. September 17th, 1915.

M. T. DOOLING,
Judge.

Filed Sep. 17, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [104]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

No. 197—IN EQUITY.

AUGUST FERDINAND KRUEGER, (Otherwise
KRUGER), Administrator of the Estate of
ANNA MARIA KRUEGER (Otherwise
KRUGER), Deceased,

Plaintiff and Respondent,

vs.

FREDERICK EGGERS, Sheriff of the City and
County of San Francisco, California et als.,
Defendants and Appellants.

Praeipice for Transcript on Appeal.

To the Clerk of Said Court,

Sir: Please prepare transcript on appeal, incorporating the following portions of the record:

The Bill of Complaint,

Order to Show Cause and Restraining Order.

Motion of Defendant Suter to Dismiss,

Affidavit of Edward C. Harrison in Response to Order to Show Cause.

Certified Copy of Deed, B. P. Oliver, Commissioner, to Daniel Suter, dated July 18, 1904.

Certified Copy of Answer to Summons of Ejectment Suit.

Order Granting Motions to Dismiss as to E. C. Harrison and M. E. Harrison and Denying the Motions of the Other Defendants.

Counter-affidavit of W. Temple in Reply to Affidavit of Edward C. Harrison.

Order Granting Injunction *pendente lite* and restraining Defendants as Prayed for in the Bill. Petition for Allowance of Appeal and Order of Allowance of Appeal. [105]

Assignment of Errors on Appeal,

Bond on Appeal.

Citation on Appeal.

Whatever Statement on Appeal may Hereafter be Settled.

EDWARD C. HARRISON,
MAURICE E. HARRISON,

Attorneys for Defendants and Appellants Sophie Suter, Sophie Suter, Executrix of the Will of Daniel Suter, Deceased, and Frederick Eggers, Sheriff of the City and County of San Francisco, California.

PETER tum SUDEN,

Attorney for Defendant and Appelant Otto tum Suden.

Due service and receipt of a copy of the within Praeceptum for Transcript on Appeal is hereby admitted this 27th day of September, 1915.

WARNER TEMPLE,
M. H. FARRAR,

Attorneys and Solicitors for Plaintiff and Appellee August Ferdinand Krueger (otherwise Kruger) as Administrator of the Estate of Anna Maria Krueger (otherwise Kruger), Deceased.

[Endorsed]: Filed Sep. 27, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [106]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

No 197—IN EQUITY.

AUGUST FERDINAND KRUEGER (*alias*) KRUEGER) as Administrator of the Estate of ANNA MARIA KRUEGER (*alias* KRUEGER) Deceased,

Plaintiff,

vs.

FREDERICK EGGERS, Sheriff of the City and County of San Francisco, California; SOPHIE SUTER; SOPHIE SUTER, as Executrix of the Will of DANIEL SUTER, Deceased; and, OTTO TUM SUDEN,

Defendants.

Praeipie for Transcript on Appeal Asked by Appellee.

To the Clerk of the said District Court:

Please incorporate, in the preparation of the transcript of appeal, in the above matter, the following portions of the record:

1. The entire judgment-roll in action No. 50,766, Superior Court, San Francisco, entitled,—Sophie Suter, as Executrix, etc., vs. August F. Kreuger.

Also, the following papers, filed and of record in the said action of the Superior Court, San Francisco, numbered 50,766, and entitled, Sophie Suter, as Executrix, etc., vs. August F. Krueger, to wit:

Petition of Guardian *ad litem* (filed Jul. 22, 1914).

Order of Compromise (filed Jul. 22, 1914).

Order (filed Jul. 24, 1914).

Release of Errors and Waiver of Appeal (filed Jul. 24, 1914). [107]

Affidavit of Otto tum Suden (filed Aug. 7, 1914).

Bond of Appellee, for \$1000.00 on temporary injunction.

MERCER H. FARRAR,

WARNER TEMPLE,

Attorneys for Plaintiff. Phone Douglas 8896, Room 725 Clunie Building, 519 California St., San Francisco.

[Endorsed]: Filed Oct. 4, 1915. Walter B. Mal-
ing, Clerk. [108]

*In the District Court of the United States, for the
Northern District of California, Second Divi-
sion.*

No. 197—IN EQUITY.

AUGUST FERDINAND KRUEGER (*alias* KRUEGER), as Administrator of the Estate of ANNA MARIA KRUEGER (*alias* KRUEGER), Deceased,

Plaintiff,

vs.

FREDERICK EGGERS, Sheriff of the City and County of San Francisco, California; SOPHIE SUTER; SOPHIE SUTER, as Executrix of the Will of Daniel Suter, Deceased, and OTTO tum SUDEN,

Defendants.

Directions as to General Contents of Record on Appeal.

It appearing that a difference has arisen between the parties concerning directions as to the general contents of the record to be prepared on the appeal from the order and interlocutory decree granting injunction in the above-entitled cause, and such difference having been submitted to the undersigned judge in accordance with Rule 75 of the Rules of Practice in Equity, and it further appearing, that the papers and documents hereinafter enumerated are not portions of the record in this cause and, in so far as they are material to the said appeal, they have been set out in the statement of the evidence on such appeal this day settled and signed,

IT IS HEREBY ORDERED that the record on said appeal shall not include the following papers and documents mentioned in the praecipe of appellant:

1. The entire judgment-roll in action No. 50,766, Superior Court, San Francisco, entitled, Sophie Suter, as Executrix, etc., vs. August F. Kruger. [109]

Also, the following papers, filed and of record in the said action of the Superior Court, San Francisco, numbered 50,766, and entitled, Sophie Suter, as Executrix, etc., vs. August F. Krueger, to wit:

Petition of Guardian *ad litem* (filed July 22, 1914).

Order of Compromise (filed July 22, 1914).

Order (filed July 24, 1914).

Release of Errors and Waiver of Appeal (filed July 24, 1914).

Affidavit of Otto tum Suden (filed Aug. 7, 1914).

Dated October 20, A. D. 1915.

M. T. DOOLING,
District Judge.

[Endorsed]: Filed Oct. 20, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [110]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

No. 197—EQUITY.

AUGUST FERDINAND KRUEGER (Otherwise
KRUGER), as Administrator of the Estate of
ANNA MARIA KRUEGER (Otherwise
KRUGER), Deceased.

Plaintiff,

vs.

FREDERICK EGGERS, Sheriff of the City and
County of San Francisco, California; SOPHIE
SUTER, as Executrix of the Will of Daniel
Suter, Deceased; SOPHIE SUTER, OTTO
tum SUDEN, EDWARD C. HARRISON and
MAURICE E. HARRISON,

Defendants.

I, Walter B. Maling, Clerk of the District Court
of the United States, in and for the Northern Dis-
trict of California, do hereby certify the foregoing

one hundred ten (110) pages, numbered from 1 to 110, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, in conformity with the praecipies for record on appeal and the directions as to general contents of record on appeal filed herein, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals, for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$64.40; that said amount was paid by Harrison & Harrison, Esqrs., solicitors for defendants Sophie Suter, as executrix of the will of Daniel Suter, deceased, and Sophie Suter; that the original Citation issued in said cause is hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 16th day of November, A. D. 1915.

[Seal] WALTER B. MALING,
Clerk U. S. District Court, Northern District of
California.

[Ten Cent Internal Revenue Stamp. Canceled
Nov. 16, 1915. W. B. M.] [111]

[Citation on Appeal (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to August Ferdinand Krueger (otherwise Kruger), Administrator of the Estate of Anna Maria Krueger (Otherwise Kruger), Deceased, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals

for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein Frederick Eggers, Sheriff of the City and County of San Francisco, California, Sophie Suter, Sophie Suter, as Executrix of the Will of Daniel Suter, deceased, and Otto tum Suden are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 17th day of September, A. D. 1915.

M. T. DOOLING,
United States District Judge. [112]

Receipt of a copy of the within citation on appeal, on this 18th day of September, A. D. 1915, is hereby admitted, with all rights of appellee reserved.

MERCER H. FARRAR,
WARNER TEMPLE,

Attorneys and Solicitors for Appellee, August Ferdinand Krueger (Otherwise Kruger), Administrator of the Estate of Anna Maria Krueger (Otherwise Kruger), Deceased.

[Endorsed]: No. 197—In Equity. United States District Court for the Northern District of Califor-

nia. Frederick Eggers, Sheriff, etc., et al., Appellants, vs. August Ferdinand Krueger, alias, Admr., Appellee. Citation on Appeal. Filed Sep. 20, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

FREDERICK EGGERS, Sheriff of the City and
County of San Francisco, California; SOPHIE
SUTER, SOPHIE SUTER, as Executrix of
the Will of Daniel Suter, Deceased, and
OTTO TUM SUDEN,

Appellants,

vs.

AUGUST FERDINAND KRUEGER (Otherwise
KRUGER), as Administrator of the Estate of
ANNA MARIA KRUEGER (Otherwise
KRUGER), Deceased.

Appellee.

**Order Enlarging Time to [November 15, 1915] File
Record.**

For good cause shown, It is Hereby Ordered that Frederick Eggers, Sheriff of the City and County of San Francisco, California, Sophie Suter, Sophie Suter, as Executrix of the Will of Daniel Suter, deceased, and Otto tum Suden, the appellants in the above-entitled cause, be and they are hereby allowed thirty days from and after the 16th day of October, A. D. 1915, within which to file the record of their appeal therein and to docket the case with the clerk

of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated October 13, 1915.

M. T. DOOLING,
District Judge.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Frederick Eggers, Sheriff et al., Appellants, vs. August Ferdinand Krueger (Otherwise Kruger), Administrator, Appellee. Order Enlarging Time to File Record. Filed Oct. 13, 1915. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

FREDERICK EGGERS, Sheriff of the City and County of San Francisco, California; SOPHIE SUTER, SOPHIE SUTER, as Executrix of the Will of Daniel Suter, Deceased, and OTTO tum SUDEN,

Appellants,

vs.

AUGUST FERDINAND KRUEGER (Otherwise KRUGER), as Administrator of the Estate of ANNA MARIA KRUEGER (Otherwise KRUGER), Deceased.

Appellee.

Order Enlarging Time to [December 16, 1915] File Record.

For good cause shown, it is hereby ordered that Frederick Eggers, Sheriff of the City and County of San Francisco, California, Sophie Suter, Sophie

Suter, as Executrix of the Will of Daniel Suter, deceased, and Otto tum Suden, the appellants in the above-entitled cause, be and they are hereby allowed thirty days from and after the 16th day of November, A. D. 1915, within which to file the record of their appeal therein and to docket the case with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated November 10, 1915.

M. T. DOOLING,
District Judge.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Frederick Eggers, Sheriff et al., Appellants, vs. August Ferdinand Krueger (otherwise Kruger), Administrator, Appellee. Order Enlarging Time to File Record. Filed Nov. 10, 1915. F. D. Monckton, Clerk.

No. 2681. United States Circuit Court of Appeals for the Ninth Circuit. Two Orders Under Rule 16 Enlarging Time to Dec. 17, 1915, to File Record Thereof and to Docket Case. Refiled Nov. 16, 1915. F. D. Monckton, Clerk.

[Endorsed]: No. 2681. United States Circuit Court of Appeals for the Ninth Circuit. Frederick Eggers, as Sheriff of the City and County of San Francisco, California, Sophie Suter, Sophie Suter, as Executrix of the Will of Daniel Suter, Deceased, and Otto tum Suden, Appellants, vs. August Ferdinand Krueger (Otherwise Kruger), Administrator of the Estate of Anna Maria Krueger (Otherwise

Kruger), Deceased, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Second Division.

Filed November 16, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FREDERICK EGGERS, as Sheriff of the City
and County of San Francisco, California,
SOPHIE SUTER, SOPHIE SUTER, as Executrix
of the Will of Daniel Suter, Deceased, and
OTTO TUM SUDEN,

Appellants,

vs.

AUGUST FERDINAND KRUEGER (otherwise
Kruger), Administrator of the Estate of
Anna Maria Krueger (otherwise Kruger),
Deceased,

Appellee.

Upon Appeal from the United States District Court for the Northern
District of California, Second Division.

Filed

BRIEF FOR APPELLANTS.

MAR 11 1916

F. D. Monckton
Clerk

EDWARD C. HARRISON,

MAURICE E. HARRISON,

Solicitors for Appellants.

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2681

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FREDERICK EGGERS, as Sheriff of the City
and County of San Francisco, California,
SOPHIE SUTER, SOPHIE SUTER, as Executrix
of the Will of Daniel Suter, Deceased, and
OTTO TUM SUDEN,

Appellants,

vs.

AUGUST FERDINAND KRUEGER (otherwise
Kruger), Administrator of the Estate of
Anna Maria Krueger (otherwise Kruger),
Deceased,

Appellee.

Upon Appeal from the United States District Court for the Northern
District of California, Second Division.

BRIEF FOR APPELLANTS.

Statement of Facts.

This is a suit in equity to enjoin the enforcement of a judgment in the state court for the recovery of certain real property situated in San Francisco.

The appeal is by the defendants from an interlocutory order granting an injunction.

The controversy between the parties is mainly concerned with the validity and legal effect of certain judgments and proceedings which, for the sake of clearness, may be enumerated as follows:

1. An action brought in the state court in 1902 by the Hibernia Savings and Loan Society against John Farnham, as the then administrator of the appellee's intestate, Anna Maria Krueger, for the foreclosure of a mortgage upon the property in question, in which a decree of foreclosure was rendered. This action will be referred to in the course of this brief as the foreclosure action.

2. An action commenced in the same court by the appellant Sophie Suter, as executrix of the will of Daniel Suter, deceased, against the appellee August F. Krueger, to recover the possession of the property. It is the judgment in this action the execution of which is restrained by the order appealed from. For convenience, this may be called the ejectment action.

3. Reference will also be made to a suit in equity in the United States District Court, between the same parties and brought for the same relief as the one now before the court, which other action may be conveniently described as the first injunction suit.

4. Finally, there is the present, or second injunction suit, seeking to enjoin the execution of judgment in the ejectment action.

The bill in this case alleges that Anna Maria Krueger died intestate on May 1, 1902, leaving as her only heir, her son, the plaintiff and appellee, August Ferdinand Krueger; and that at the time of her death she was the owner of the property in dispute, subject to two mortgages, one to the Hibernia Savings and Loan Society and another to Daniel Suter. After her death, John Farnham, public administrator of the City and County of San Francisco, was duly appointed her administrator.

Thereafter, in November, 1902, the Hibernia Bank brought the foreclosure action, joining as defendants, Farnham, as administrator of Anna Maria Krueger, deceased, and also Suter, the other mortgagee. The bill then goes on to allege that there was no service of summons on Farnham in this action and "that no answer, appearance or demurrer was ever filed in said action * * * by the said administrator, or by any person in his behalf." The defendant Suter filed an answer praying for the foreclosure of his mortgage, and judgment was entered for the foreclosure of both the bank and the Suter mortgage, and for the appointment of B. P. Oliver as Commissioner to sell the premises. At the sale under this judgment by Commissioner Oliver, the defendant Daniel Suter purchased, and received a certificate of sale. The bill also alleges that no deed was made by the Commissioner to Suter "conveying the title to said property", but as a certified copy of the deed was produced on the hearing, and no effort made to deny its genuine-

ness, this allegation must be treated as a pure conclusion of law. In April, 1904, plaintiff and appellee, August F. Krueger, having, as the bill states, discovered the facts regarding the foreclosure decree, petitioned for his own appointment as administrator of his mother's estate in the place of Farnham, and after having been appointed as such administrator, moved the court in the foreclosure action for an order setting aside the decree of foreclosure, on the ground of want of jurisdiction. This motion of the new administrator, it is alleged, was granted, and an order was made purporting to set aside the former decree of foreclosure.

In 1913 Daniel Suter died, and the defendant Sophie Suter was duly appointed his executrix. In the same year she brought the action of ejectment in the superior court against August F. Krueger. Trial of this action was had before Hon. Geo. A. Sturtevant, one of the judges of said Superior Court, in 1914, the defendant therein, August F. Krueger, appearing personally and also by Ottum Suden, his guardian *ad litem* appointed by the court. After this trial judgment was rendered for Krueger, the defendant in the ejectment action. Thereafter, it is alleged in paragraph XIII of the bill, tum Suden, the guardian *ad litem* of Kruger, agreed with the attorneys for the plaintiff, that this judgment might be set aside, and that the cause might be retried, and it was again tried on July 11, 1914, and the guardian *ad litem* permitted judgment on this second trial to go in favor of the

plaintiff for the recovery of the property, thereafter informing Kruger, the defendant therein and the plaintiff and appellee herein, that Sophie Suter, as executrix, the adverse party, had paid, under an order of compromise of the said superior court, the sum of \$1500.00, of which the guardian *ad litem* was to retain \$250.00 as his compensation. Outside of mere verbiage and conclusions of law, these are the only facts stated in the bill which have any bearing on the obtaining of the judgment in the action of ejectment, which appellee wishes to be relieved against. The remainder of the bill asserts threats by the defendants herein to enforce the judgment in ejectment; that the value of the property is \$18,000.00; that plaintiff herein has offered to pay to Sophie Suter, executrix, defendant herein, all moneys due her deceased husband, "the money to be obtained by a sale" of the said property; and that plaintiff has paid the taxes on the property since the rendition of the foreclosure judgment. The bill alleges the citizenship of the plaintiff but not of the defendants.

The foregoing are in substance, the material allegations of the bill in this cause. We have separated them from the other facts developed at the hearing, because we wish to ask this court, not merely to reverse the order granting the injunction, but also to dismiss the action, as being wholly without merit, in accordance with the practice in such cases.

On the day after the bill in this suit was filed, there was issued an order to show cause why an injunction against the enforcement of the ejectment judgment should not issue, and a temporary restraining order. Upon the return of the order to show cause, the respondents and defendants made a complete showing, by affidavits and other documentary evidence, regarding the allegations of the bill; and with the exception of a few matters of detail, to be hereinafter noted, the facts were not disputed.

It appeared that the ejectment suit was begun in the superior court of San Francisco on August 5, 1913; that summons was duly served on August F. Krueger, the defendant therein and plaintiff herein; and that he failed to appear within the time allowed by law and was in default, but that the attorney for the plaintiff Sophie Suter did not take his default because of his belief of Krueger's incompetence. Subsequently Krueger served and filed an answer, which is set out in full at pages 52 et seq. of the transcript, stating no defense to the action, and exceedingly rambling and incoherent in its expression. Mrs. Suter's counsel, however, because of his belief that Krueger was *non compos mentis*, did not apply for a judgment on the pleadings, but instead applied to the court in which the action was pending for the appointment of a guardian *ad litem* to represent Krueger in the defense of the action, the application being based on the ground of incompetency. Thereupon, on

September 17, 1913, the court made an order to show why a guardian *ad litem* should not be appointed. This order to show cause was served on Krueger by the sheriff, and upon its hearing, the court found and adjudged that he was incompetent, and appointed Otto tum Suden, an attorney at law, to represent him as guardian *ad litem*. These proceedings were not questioned by Krueger in this suit, and were alleged by him under oath in his bill in the first injunction suit (trans. p. 75).

Thereafter tum Suden, the guardian *ad litem*, appeared and by his answer and an amendment thereto denied the allegations of the complaint, and pleaded the defense of the statute of limitations.

Trial was had of the ejectment suit on December 9, 1913, at which trial the guardian *ad litem* was present; and also "the said Krueger was present at such trial, and to the extent that he was mentally able to do so, participated in the same, and counseled with, and assisted his guardian *ad litem* in his conduct of the defense to said action".

Regarding the evidence adduced at this trial, there are one or two details in which the affidavits of Edward C. Harrison (for the defendants) and Warner Temple (for the plaintiff) are in conflict. As Mr. Temple, in his affidavit, asks leave to refer to the transcript of testimony of the trial as to such conflict (trans. pp. 67-68), and as this transcript, duly certified, was admitted in evidence and forms a part of the record (pp. 78 et seq.), it may

be considered as controlling as to what testimony was before the superior court on the first trial of the ejectment suit.

Therefrom it appears that upon the cause being called for trial, plaintiff Sophie Suter introduced in evidence a deed from defendant to his mother Anna Maria Krueger and a commissioner's deed from B. P. Oliver, the commissioner appointed in the foreclosure suit, to Daniel Suter, plaintiff's testator. The defendant August Krueger was then called as a witness for plaintiff, but his guardian *ad litem* objected to his testifying on the ground of his incompetency, and the court then examined him to determine his competence to testify, and held that he was incompetent, and refused to allow him to testify. After plaintiff rested, defendant called as a witness Warner Temple, who had been Krueger's attorney in the foreclosure suit, and who, though not employed in the ejectment suit, is now representing Krueger in the present proceeding. Mr. Temple testified that after judgment had been rendered in the foreclosure suit, Krueger consulted him about an appeal therefrom, about five or six weeks before the expiration of time to appeal. He procured the issuance to Krueger of letters of administration of his mother's estate on May 20, 1904, and an order was made substituting Krueger for Farnham as a party defendant in the foreclosure suit. Upon his employment he examined the records in the foreclosure suit, and found that although the register showed that an affidavit of service

of summons had been made, there was no such affidavit on file, and furthermore that there was no answer on file on behalf of the defendant Farnham, as administrator. Thereupon Temple made a motion to set aside the decree on the ground that it erroneously recited that Farnham had filed an answer whereas in fact he had not. This motion was by the court denied, and on motion of Daniel Suter, an order was made permitting the filing of an answer by Farnham *nunc pro tunc*. Thereafter Temple, as attorney for Krueger, appealed from this order, and when the judge was about to settle the bill of exceptions on this appeal, he announced a change of mind with regard to his ruling on the motion, and told Temple that if he would renew the motion, he would grant it. Temple did renew the motion to set aside the decree, and the motion was granted, on or after September 5, 1905 (p. 82).

On cross-examination, the witness Temple testified that the foreclosure judgment was rendered June 16, 1903; that Krueger first called on him in May, 1904, and that upon his examination of the record at that time, he found that Daniel Suter had bought the property at foreclosure sale from Oliver, the commissioner. The decree of foreclosure recited the appearance of counsel for Farnham at the trial.

The following testimony on cross-examination is especially important:

“I first made my motion to vacate the judgment the same day I got Mr. Krueger appointed

administrator of his mother's estate, or the next day. I first had him substituted as defendant in the case. I then filed a motion of appeal from the judgment, and gave \$300 bond. I made the motion to vacate the judgment before I served the notice of appeal. In my moving papers I stated the ground of the motion to be for defects apparent on the face of the decree, because, it recited that Mr. Farnham appeared and filed his answer, and there was no answer filed. That was the ground of my motion."

In rebuttal, plaintiff Sophie Suter called Mr. Geo. A. Clough, who testified that he was one of the attorneys for the plaintiff in the foreclosure action, that McGowan and Westlake were the attorneys for the defendant Farnham, as administrator of the estate of Anna Maria Krueger, deceased; that these attorneys served the attorneys for the plaintiff with an answer, that both Mr. McGowan and Mr. Westlake appeared on the trial of the action of foreclosure as attorneys for Farnham, and that the decree recited their appearance. Mr. Clough did not learn until Mr. Temple appeared in the case that the answer which had been served had never been filed.

Such was the evidence before the superior court on the trial of the ejectment suit. It may be summarized as follows: (1) Plaintiff therein made out a prima facie case by proof of deeds from defendant to his mother, and from a commissioner in a foreclosure suit to which the mother was a party. (2) Defendant therein met this by testimony show-

ing that the foreclosure decree had been set aside by an order made fifteen months after its rendition, and based on the ground that the decree falsely recited the filing of an answer. The question before the court was whether the order setting aside the decree was valid (a) when the defendant had served his answer and appeared on the trial and participated therein, and had not applied within six months for relief against the decree; and (b) when an appeal was pending from the judgment, and the trial court had thereby lost jurisdiction of the cause. It may be noted that these questions were not so simple as to require an immediate answer favorable to the ejectment-defendant, August F. Krueger.

At this first trial of the ejectment suit, counsel for the parties overlooked the testimony as to the pendency of an appeal from the judgment of foreclosure (trans. p. 99), and after the submission of the cause, the court, on March 4, 1914, rendered judgment in favor of the defendant. Thereupon in due time plaintiff moved for a new trial, and a bill of exceptions was settled which was in all respects full, fair and correct (trans. p. 98). This bill of exceptions brought to the attention of respective counsel the point already referred to, that the pendency of the appeal from the foreclosure decree rendered the order setting aside that decree beyond the court's jurisdiction, and showed the judgment entered for defendant in the ejectment suit to be therefore erroneous. Negotiations for

a compromise were thereupon opened, the guardian *ad litem* foreseeing that a new trial must necessarily result in a judgment for plaintiff, and realizing also that his ward had no property or means with which to pay the expense of further litigation, and that even if he prevailed, his equity in the property in question would be subject to the mortgages of which the Suter estate would then be the equitable owner. After numerous consultations, tum Suden, the guardian *ad litem*, agreed upon the sum of fifteen hundred dollars as a proper amount to be paid Krueger for his interest in the property, and as the consideration for allowing judgment to go against him. It appears fully from the evidence that this sum was in excess of the value of Krueger's interest in the property. Meanwhile the superior court had granted a new trial of the action, and the cause submitted on the evidence introduced on the first trial. On July 15, 1914, after such second trial, the court rendered judgment for the plaintiff, Sophie Suter, as executrix, this being the judgment whose enforcement is sought to be enjoined in this action. On July 22, Mr. tum Suden, the guardian *ad litem*, filed his petition setting forth the fact that he had agreed with the plaintiff upon a compromise of the dispute for the sum of fifteen hundred dollars, and setting forth also the reasons which impelled him to agree to this compromise (see copy of this petition, trans. pp. 90, 91). The compromise and the considerations and the inducements leading up to it were thereafter fully ex-

plained to the judge who presided at the trial of said action (trans. p. 37), and after such explanation, and on said July 22nd, an order was made by him approving the compromise (which order is set out at page 92 of transcript).

The sum of \$1500, theretofore agreed upon, was then paid by Mrs. Suter to Mr. tum Suden, the guardian *ad litem*, and in return he executed a release of errors and waiver of appeal. No part of the \$1500 has ever been repaid to Mrs. Suter. Later the court made an order authorizing the guardian *ad litem* to pay to himself as attorney's fees the sum of \$250.00 and to deposit the remaining \$1250.00 to the credit of Krueger in the German Savings and Loan Society.

Thereafter, on August 5, 1914, Krueger, the ejectment defendant and the plaintiff herein, appeared in the ejectment suit personally and through an attorney, Arthur Crane, other than his guardian *ad litem*, served notice of a motion to set aside all the rulings against him, including the order appointing the guardian *ad litem*, the order granting the new trial, the judgment for plaintiff, the order approving the compromise, and the order allowing the guardian compensation. The motions were made on the grounds that Krueger was competent that the guardian *ad litem* did not have authority to compromise, and that the court was not informed of the facts regarding the compromise. This motion, and the affidavits of Krueger and one Moise, upon which it was made, are set forth at

pages 39 to 45 of the record. The motion came on for hearing on August 7th, and was heard on these affidavits on the one hand, and on the affidavits of Otto tum Suden and Edward C. Harrison on the other; and on August 17, 1914, the superior court duly made its order denying the motions (trans. pp. 45, 46).

Specification of Errors.

The errors relied on in this appeal may be conveniently divided into (A) those which show the insufficiency of the bill, and therefore call for the dismissal of the cause; and (B) those additional considerations which show that upon the facts proved, the order for the injunction was erroneous.

(A) DEFECTS IN THE BILL.

(1) The bill fails to allege the citizenship of the defendants, and therefore does not show any federal jurisdiction.

(2) The bill is without equity, because it shows a plain, speedy and adequate remedy at law by motion in the ejectment action.

(3) The bill is without equity, because it fails to show that the judgment in the state court was obtained by fraud.

(4) The bill is without equity, because it fails to show a meritorious defense to the action in the state court, and particularly fails to show that

appellee, or the estate of which he is administrator, has any interest in the property in dispute.

(B) OTHER ERRORS IN GRANTING THE INJUNCTION.

(5) The injunction is erroneous, because it is directed to an officer of the state court, and stays proceedings on the execution of a judgment of that court, in violation of the statute.

(6) The order granting the injunction is erroneous, because it does not require any security, in violation of section 18 of the Act of Congress of October 15, 1914.

(7) The order granting the injunction is erroneous, because it does not set forth the reasons for its issuance, nor is it specific in its details, nor does it describe in reasonable detail the acts restrained, thereby violating section 19 of the act last mentioned.

(8) The order granting the injunction is erroneous, because it appeared on the hearing that the judgment in the ejectment suit was not obtained by fraud, that appellee is bound by the finding of the state court as to his competency, and further that the judgment in the state court was proper on the testimony before it.

(9) The order granting the injunction is erroneous, because it appeared on the hearing that appellee had attacked the judgment by motion in the state court on the grounds here urged, that he was

fully heard on such grounds, and his motion was denied; and that the denial of such motion is a bar to his obtaining an injunction in this proceeding.

Argument.

We earnestly contend that not only did the trial court seriously err in granting the injunction upon the facts proved at the hearing, but that the bill itself is without equity, and should be dismissed; and we therefore ask not only for a reversal of the order, but also for a direction for such dismissal.

It is now settled law, by the decision in *Smith v. Vulcan Iron Works*, 165 U. S. 518; 41 L. Ed. 810, that the circuit court of appeals, on an appeal from an interlocutory order, may, if it is of the opinion that the bill is without equity, order its dismissal, in order to save both parties from the expense of further litigation. To the same effect are:

Metropolitan Water Co. v. Kaw Valley District, 223 U. S. 519; 56 L. Ed. 533;

Highland Glass Co. v. Schmertz Wire Glass Co., 178 Fed. 944, 970;

La Hogue District v. Watts, 179 Fed. 690;

Sheffield Co. v. D'Arcy, 194 Fed. 686.

We will therefore discuss first the questions which go to the sufficiency of the bill.

I. THE BILL IS INSUFFICIENT, AND MUST BE DISMISSED, BECAUSE IT FAILS TO SHOW JURISDICTION IN THE FEDERAL COURTS.

There is no showing of any federal jurisdiction in the bill, or elsewhere in the record, except on the ground of diversity of citizenship. And although the citizenship of plaintiff is alleged, there is no allegation whatever of the citizenship of the defendants, or any of them. It therefore necessarily follows that the order must be reversed, and the bill dismissed.

Wolfe v. Hartford Ins. Co., 148 U. S. 389;
37 L. Ed. 493;

Timmons v. Elyton Land Co., 139 U. S. 378;
35 L. Ed. 195;

Horne v. Geo. H. Hammond Co., 155 U. S.
393; 39 L. Ed. 197;

Atlantic Coast Line Co. v. Whilden, 195 Fed.
263.

II. THE BILL IS WITHOUT EQUITY, BECAUSE IT SHOWS A PLAIN, SPEEDY AND ADEQUATE REMEDY AT LAW BY MOTION IN THE COURT IN WHICH THE JUDGMENT WAS RENDERED.

It may be urged that the defect of all jurisdictional averment might be cured by amendment; but the bill is entirely without equity, for failure to show the absence of an adequate remedy at law. In other words, the circumstances are such that plaintiff had a speedy and adequate remedy at law,

and consequently has no cause of action in equity, and the bill should be dismissed.

The bill is one to enjoin the enforcement of a judgment recovered in the superior court of San Francisco, rendered in an action to recover the possession of real property. It attempts to allege, for the purpose of justifying this relief, that the judgment was obtained by the fraud of plaintiff's guardian *ad litem* and the adverse party. Assuming, for the purpose of this point, that there is a sufficient allegation of such fraud, there was open to the plaintiff a sufficient remedy by motion to set aside the judgment made in the court where the judgment was rendered.

And section 473 of the Code of Civil Procedure of California contains the following provision:

“The court * * * may also, upon such terms as may be just, relieve a party or his legal representative from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect; provided, that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order or proceeding taken.”

Where a judgment is obtained by fraud, the injured party may obtain redress under this section, as held by the supreme court of California in the following cases:

Craig v. San Bernardino Investment Co.,
101 Cal. 122;

McGowan v. Kreling, 117 Cal. 31.

In the present case the bill alleges that plaintiff was informed of the judgment by his guardian *ad litem*, but when this knowledge came to him does not there appear, (but it does affirmatively appear from his affidavit of August 4, 1914, set forth on pages 41 to 43, inclusive, of the transcript, that he knew it in less than four weeks after its rendition); nor is there any allegation that he could not have availed himself of the statutory remedy, or made any effort to do so. The case therefore comes squarely within the rule of the following two cases, holding that under such circumstances there is an adequate remedy at law, and the pleading is insufficient.

Eldred v. White, 102 Cal. 600;

Heller v. Dyerville Mfg. Co., 116 Cal. 127.

Eldred v. White was an action to set aside a judgment on the ground of fraud. The facts bearing upon this question are stated as follows in the opinion of the court:

“This present action was not commenced until thirteen months after the date of the judgment in the foreclosure suit; and no reason is shown why it was not commenced sooner, or why appellant did not proceed, under section 473 of the Code of Civil Procedure, to obtain leave ‘to answer to the merits of the original action’, or why he has not exhausted other remedies at law before invoking the aid of a court of equity. There is no averment or finding that he did not know of the former judgment at the time of its rendition.”

And a judgment for the defendants was affirmed on the ground that the complaint did not state facts sufficient to constitute a cause of action.

Again, in *Heller v. Dyerville Mfg. Co.*, *supra*, the action was an equitable one, to modify a judgment on the ground of fraud. The court, speaking through Van Fleet, J., said:

“In the next place, we think the complaint discloses a case in which plaintiffs had a plain, speedy and adequate remedy at law, and in such case there is no occasion to resort to equity, and it will not be permitted. (*Ketchum v. Crippen*, 37 Cal. 223; *Eldred v. White*, 102 Cal. 600). The judgment was entered April 26, 1892. Plaintiffs aver that they had no notice of this fact until ‘subsequent to April 26, 1892’, but this, under a proper construction of the pleading, is equivalent to the averment that they had such knowledge immediately after that date—as early as April 27th, if need be. (*Collins v. Townsend*, 58 Cal. 614.) Furthermore, it appears that they at all events had such knowledge on July 29, 1892, on which date they were served with an order to show cause why they should not be held guilty of a violation of the decree. Even the latter date was well within the six months from the entry of the decree within which, under section 473 of the Code of Civil Procedure, they could have moved for its modification. The fact that under a misapprehension of their rights they failed to take advantage of this remedy until too late, affords no ground for equitable relief.”

The court then proceeded to hold that inasmuch as the complaint did not state a cause of action, the order for an injunction and the judgment should be reversed.

This rule, that equitable relief may not be had against judgments or other legal proceedings, unless it be shown that plaintiff has been deprived of his complete legal remedy by motion, is also supported by the following cases:

Richards v. Kirkpatrick, 53 Cal. 433;

Moulton v. Knapp, 85 Cal. 385;

Ede v. Hazen, 61 Cal. 360;

Rucker v. Langford, 138 Cal. 611.

The same rule is applied by the federal courts in actions attacking judgments on the ground of fraud. Such was the character of the suit of Nougue v. Clapp, 101 U. S. 551, 25 L. Ed. 1026, where the bill alleged that a certain foreclosure decree in the state courts of Louisiana had been obtained by fraud. It was held that since the state law allowed a motion in its courts in the very action, to set aside the decree, and there was no showing in the bill that the plaintiff had pursued this remedy, the federal courts would not interfere.

In the later case of Marshall v. Holmes, 141 U. S. 589, 35 L. Ed. 870, the bill affirmatively alleged that the plaintiff did not learn of the fraudulent judgment until it was too late to make the proper motion; and on that ground Nougue v. Clapp was distinguished, and in so distinguishing that case, the court says:

“Here the resemblance between that case and the one before us ends; for in Nougue v. Clapp it did not appear, nor was it alleged, that the facts constituting the fraud were not, before the rendition of the decree, within the knowl-

edge of the party seeking its annulment, or could not have been discovered in time to bring them in some appropriate mode to the attention of the court while the decree was within its control. For aught that appears, that suit was brought simply to obtain a hearing in the circuit court of the United States, sitting in equity, of issues that were, or by proper diligence could have been, fully determined in the suit at law in the state court. The relief there asked could not have been granted consistently with the rule that equity will not interfere with a judgment at law, even where the party has an equitable defense, if he could, by the exercise of diligence, have availed himself of that defense in the action at law to which he was a party. *This requirement of diligence, is, as it ought to be, enforced with strictness.*''

The rule of *Nougue v. Clapp*, requiring a resort to remedy by motion in the state court, not only as a speedy and adequate remedy at law under the general principles of equity jurisprudence, but also as a measure to be enforced for the preservation of comity between state and federal courts, has been repeatedly followed.

Graham v. Boston R. Co., 14 Fed. 753;
affirmed at 118 U. S. 162; 30 L. Ed. 196.

Again, in *Travelers' Association v. Gilbert*, 111 Fed. 270; 55 L. R. A. 538, the circuit court of appeals affirmed the dismissal of a bill seeking relief against a judgment on the ground of fraud, because a remedy by motion existed under the state statute.

To the same effect is

Folsom v. Ballard, 70 Fed. 12.

The authorities bearing upon this question of the necessity of showing the absence of an adequate remedy at law are so numerous that it would be an unnecessary imposition on the court's time to cite and discuss them all. It will suffice to call attention, in conclusion, to a decision of an almost identical case by this court. This case is that of *Bower v. Stein*, 177 Fed. 673, where the complainant sought to set aside a judgment in foreclosure in the state court, obtained by publication of summons, claiming that this judgment was obtained by fraud. In affirming a decree dismissing the bill for want of equity, Judge Gilbert says:

“Another ground on which it should be held that there is no equity in the bill is the appellant failed to avail herself of the remedy afforded by the statute of Oregon, which provides that the defendant against whom a judgment is taken on service by publication, may upon good cause shown, and upon such terms as may be proper, be allowed to defend within one year after judgment. Under that statute, it has been held that an allegation that the plaintiff in the action did not try to find the defendant's address may be considered upon a motion to open the decree, *Smith v. Smith*, 3 Or. 363. According to the allegations of the bill, the appellant had notice of the foreclosure suit in ample time to have availed herself of the remedy so afforded by the state statute. A party who thus neglects to avail himself of the remedies afforded in the state court is precluded from resorting to a federal court to obtain relief against the decree. *Nougue v. Clapp*, 101 U. S. 551; *Graham v. Boston R. Co.*, 14 Fed. 753, affirmed in 118 U. S. 162.”

The remedy discussed in *Bower v. Stein*, by which the defendant may move to set aside a judgment taken on service by publication stands in the same position as a motion to set aside a judgment, for fraud or inadvertance, under the California Code. Indeed the same section, 473, of the Code of Civil Procedure, which gives the remedy by motion which we insist was adequate in the present case, includes also a provision for the same relief against service by publication which was discussed in *Bower v. Stein*. If in that case the complainant was obliged to show a deprivation of the statutory right, the appellee is under the same obligation in this cause; and his bill is thus shown to be without equity, under this and the other decisions mentioned above.

III. THE BILL IS WITHOUT EQUITY, BECAUSE IT FAILS TO SHOW THAT THE JUDGMENT IN THE STATE COURT WAS OBTAINED BY FRAUD.

The bill in this case is fatally defective, because it does not state facts showing that the judgment against which relief is sought was obtained by fraud. As will be seen, appellee must rest entirely on this claim of fraud, if he wishes to resist the enforcement of the judgment.

The only allegations of the bill which can have any bearing upon the question of fraud are those contained in paragraphs XII and XIII, on pages 9 to 12 of the record. These allegations contain a

mass of verbiage, by means of which almost every act of the appellants is charged to be fraudulent, and every agreement between them is characterized as a "conspiracy." Such language cannot, of course, supply the absence of the facts constituting the fraud. The facts may be summarized as follows: On August 5, 1913, the appellant Sophie Suter, as executrix, sued the appellee in the state court; that court appointed the appellant Otto tum Suden as guardian *ad litem* of the appellee Krueger, the appellee also appearing in person; the action was tried before Hon. Geo. A. Sturtevant, a judge of that court, on March 3, 1914, and judgment rendered for appellee; thereafter an order of compromise was made by the court, and the guardian *ad litem* agreed with the appellant Suter that the judgment might be set aside, and it was set aside, and the action was brought to trial again. On the second trial no witnesses were called, and in accordance with the agreement between the guardian *ad litem* and the appellant Suter, judgment passed in her favor against the appellee, on July 11, 1914, and the guardian *ad litem* thereafter informed his ward, the appellee Krueger, that under the order of compromise, he had received \$1500.00 from the appellant Suter, of which he was to retain \$250.00 for his services in the action. It is further alleged that the agreement of compromise was reached without consulting appellee; that appellee was not insane; and that the appellants knew the facts regarding the title to the property in question.

It is to be noted that it appears from the bill itself that

(1) The appellant tum Suden was appointed guardian *ad litem* of the appellee by order of the court in which the action was pending; and there is no claim that this order was induced by any misrepresentation of fraudulent conduct, or that appellee did not have full opportunity to prove his competency. This order then must be treated as valid and binding upon appellee.

(2) It further appears that the dispute between the parties was attempted to be settled by a compromise agreement between the appellant tum Suden, as guardian *ad litem*, and the adverse party, the appellant Suter; but there is no allegation that this agreement was induced by any misrepresentation or other fraud. So far as it went, then, this agreement of compromise was binding.

(3) It moreover appears by inference that the compromise agreement was approved by an order of the court in which the action was pending; and again, there is nothing to show that this order of compromise was procured through any misstatement or suppression of the facts, either on the part of the appellant tum Suden, the guardian *ad litem*, or the appellant Suter, or her attorneys. Neither is there any statement that the judge was a party to any wrongful agreement, or was corrupt, or deceived by any false or misleading statement. It must therefore be assumed that the order approv-

ing the compromise was made by the court with knowledge of all the circumstances, and after a consideration of all the facts before him.

The question, then, resolves itself into this: did the court have the right to appoint a guardian *ad litem* of the appellee, after notice to him and an opportunity to be heard on the question of his competency, and did the same court have the power to approve a compromise between the guardian *ad litem* and the adverse party, without consulting the party so adjudged to be incompetent. These questions find a ready answer in the statutes of California which regulate the subject.

The statute in question is section 372 of the Code of Civil Procedure of California, providing as follows:

“When an infant, or an insane or incompetent person is a party, he must appear either by his general guardian or by a guardian *ad litem* appointed by the court in which the action is pending, in each case. A guardian *ad litem* may be appointed in any case, when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to represent the infant, insane or incompetent person in the action or proceeding, notwithstanding he may have a general guardian and may have appeared by him. The general guardian or guardian *ad litem* so appearing for any infant, or insane or incompetent person in any suit shall have power to compromise the same and agree to the judgment to be entered therein for or against his ward, subject to the approval of the court in which such suit is pending.”

In view of the allegations of the bill, it must then be assumed that the court in which the action was pending, without being imposed upon or deceived in any way, and after due hearing, determined that appellee was an insane or incompetent person and that it was expedient to appoint a guardian *ad litem*, and that the appellant tum Suden was so appointed. Upon this appointment the appellant tum Suden became vested with the power, under the statute, "to compromise" the suit "and agree to the judgment to be entered therein for or against his ward," subject to the approval of the court. This power he exercised and obtained the approval of the court to such exercise; and it will not affect the validity of his actions in this regard to call them "fraudulent" and to describe the agreement as a "conspiracy". The appellee had evidently, under the allegations of the bill, allowed himself to be declared incompetent and a guardian *ad litem* to be appointed; and there was no occasion to notify a person who was held to be *non compos*, of the proposed compromise, provided that the court deemed the compromise to be fair. The statute just quoted allowed the procedure which was followed; and indeed, the only difference between that procedure, and the course which would be followed in the absence of statute, is that here the approval of the compromise is left to the court in which the action is pending, whereas otherwise it would be left to a separate tribunal, or at least a separate proceeding, dealing with the guardianship of the incompe-

tent, to pass upon the same question. Whether the statute allows the adjudication of incompetency, and the approval of the compromise, to be made by a separate probate or guardianship court, or by the court in which the dispute is being litigated, is a mere question of expediency, of which the legislature is the sole judge. In either case, the alleged incompetent is entitled to a hearing before being subjected to guardianship; but in either case, if he be once determined to be insane, and a guardian appointed, the guardian represents him, and the court cares for his interests; and if he claims to have recovered his sanity, he must apply again to the same court for restoration to capacity, but he cannot go into another forum and another proceeding and claim that, notwithstanding the adjudication of the court made fairly and with knowledge of all the facts, he was in fact competent and that therefore the acts of his guardian done with the approval of the court were "fraudulent" because of failure to consult him.

The fact that judgment had been rendered in favor of appellee after the first trial does not change the situation. "An action is deemed to be pending from the time of its commencement until its final determination upon appeal" (Code of Civil Procedure of California, section 1049), and when the court, again without any misrepresentation and in the exercise of its jurisdiction, so far as appears from the bill, granted a new trial and vacated the judgment, the situation was the same as before the

judgment was rendered, and under section 372, the guardian *ad litem*, with the approval of the court, might compromise and agree to a judgment to be entered for or against his ward, with or without a trial, and with, or (as the bill alleges), without witnesses being called, and with or without the production of documentary evidence. In the light of the statutory power of guardians *ad litem*, the attempt to charge fraud in the bill loses all substance whatever and becomes a meaningless repetition of the words "fraud" and "fraudulently", with no facts whatever to support the characterization—a position which a court of equity will never tolerate in the pleadings of its suitors.

It is needless to cite authorities for the elementary rule that fraud cannot be charged in general terms, and that a pleading which fails to state the facts constituting the fraud is wholly without equity. We will therefore merely call the attention of the court to a few cases where the pleading was similar to that of appellee in the case at bar, and was held insufficient.

In *Heller v. Dyerville Mfg. Co.*, 116 Cal. 127, the complaint was much stronger than in the present case. It alleged that a judgment was obtained from the court in violation of a stipulation for a different judgment, by the representation of the attorney for the adverse party that it did conform to the stipulation, the representation having been made for the purpose of "cheating and defrauding" the plaintiff, upon which representa-

tion the judge relied in signing the decree. It was also alleged that the judgment was presented for signature and signed without the knowledge of plaintiff. It was held that since there was no allegation of an intent to deceive, or of knowledge on the part of the attorneys of the falsity of the representations, and since the judge and the plaintiff might have ascertained the truth of the representations, there was no case of actionable fraud.

Again, in *United States v. Norsch*, 42 Fed. 417, the government sued to set aside a decree of naturalization, alleging that an alien, not entitled to be naturalized, applied for that relief, although he knew he was not entitled to it, and the decree was made without examining any witnesses, and without any inquiry by the court, and was procured by "imposition and fraud practised upon the court". It was held that the bill was insufficient, because however morally wrong it might be for a litigant to apply for relief to which he knew he was not entitled, such conduct was not legally a fraud, unless the court had been imposed upon and deceived by some artifice or misstatement, and that the general averments of fraud do not aid the bill in any material respect.

The case of *Harbison v. Harbison*, 56 S. W. 1006, is so closely similar to the one before the court that it is deserving of especial attention. There a minor sought to set aside a waiver and abandonment of appeal, made on his behalf by his next friend, on the ground that although approved by

the court, the decree of approval was tainted with fraud. The Texas statute, like that of California, permitted a settlement by the next friend, with the approval of the court. It was held that although fraud was alleged in general terms, no sufficient case was stated for the annulment of the decree, because it was not alleged that the court had been deceived by any false representations, into making the decree approving the compromise; and because therefore it must be assumed that the facts were fully before it when the decree was made. This defect, and the failure also to allege that any misrepresentation had been made to the next friend by the adverse party, rendered the minor's petition insufficient, although it was expressly alleged that by the compromise he had lost property of great value, and that the settlement was made without consulting him. A case more nearly identical to the present one could hardly be found.

Not only does the appellee in this case allege no misrepresentation or fraud upon the court; but he fails to show that the judgment sought to be enjoined was based upon the fraud, and resulted from it. Assuming, for argument, that the guardian *ad litem* and Mrs. Suter had made some agreement which was improper or in some way was not here disclosed, a fraud upon the rights of appellee, still the court may have, on the second trial, given judgment against him because upon a consideration of the testimony adduced upon the first trial, and before it again by stipulation (which was in fact the case),

it was convinced that the first decision was erroneous. The bill in this respect fails to measure up to the rule announced in the following language in the case of *Dringer v. Erie R. Co.*, 42 N. J. Eq. 573; 8 Atl. 811:

“A court of equity may unquestionably annul a judgment or decree which has been obtained by fraud; but, in order to justify such an exercise of power, it must be made clearly to appear that the judgment or decree had no other foundation than fraud. In other words, it must be made to appear that, if there had been no fraud, there would have been no judgment or decree.”

From the foregoing considerations, it is respectfully submitted that the bill fails as one based upon fraud.

We have said that the bill states a cause of action for fraud, or nothing. However, there is some pretense in the bill, and it was urged by appellee below, that he should be relieved against the judgment against him personally, because he now claims such relief as the administrator of his mother's estate; in other words, that the judgment against him individually does not affect his rights as administrator. We shall discuss this point, not because we believe it gives any standing to the suit, but only because it was relied on in the court below by appellee, and may be urged by him here.

I. The complainant is bound in his representative, as well as in his individual capacity, by the

proceedings and judgment in the action in the state court, because

(a) He was and is the heir of the decedent whose estate he represents, as administrator, and as such heir, entitled to the possession of the property, and his possession is therefore properly referable to such right; as administrator he is privy to his possession as heir; and as heir he is entitled to prosecute or defend the action;

C. C. P., secs. 1452, 1453, 1581;

McFadden v. Ellmaker, 52 Cal. 348;

Tryon v. Huntoon, 67 Cal. 325;

Colton v. Onderdonk, 69 Cal. 155;

Spotts v. Hanley, 85 Cal. 155;

Ryer v. Fletcher Ryer Co., 126 Cal. 482.

(b) Because he actually appeared and defended the action, and, whether or not he fully discharged his duty as administrator by using every defense available to protect the estate, he had the opportunity to do so; and it is immaterial that he did not in making the defense, have himself substituted in his official capacity as the nominal defendant.

Sampson v. Ohleyer, 22 Cal. 200;

Wheelock v. Warschauer, 34 Cal. 265;

Valentine v. Mahoney, 37 Cal. 389;

Russell v. Mallon, 38 Cal. 259;

Chant v. Reynolds, 49 Cal. 213;

Davidson v. Baldwin, 2 Cal. App. 733;

Nickals v. Stanley, 146 Cal. 724, 727;

Estate of Ricks, 160 Cal. 467, 471;

C. C. P., sec. 1908.

II. The action in ejectment was properly brought against the plaintiff individually rather than as administrator.

Ejectment is "a possessory action *ex delicto* founded upon a trespass, actual or supposed, committed by defendant in wrongfully detaining possession of plaintiff's land."

Henning v. Boyer, 10 Pa. Co. Ct. 506, 508.

No action can be maintained against a personal representative as such for malfeasance, misfeasance, or for a tort.

Eustace v. Jahns, 38 Cal. 3;

Melone v. Davus, 67 Cal. 279, 282;

Sterrett v. Barker, 119 Cal. 492, 494;

Hardy v. Mayhew, 158 Cal. 95, 104;

Heydenfeldt v. Jacobs, 107 Cal. 373, 377;

Nickals v. Stanley, 146 Cal. 724, 727;

Smith v. Wood, 31 Md. 293;

Clapp v. Walters, 2 Tex. 130;

Boyle v. Krauss, 79 At. 1025;

Luscombe v. Fintzelberg, 162 Cal. 433, 443.

Ejectment being a possessory action, it is necessary to make the actual occupant of the premises a defendant; and where the premises are actually occupied, he is the only proper party defendant.

7 Encyc. of Pl. and Pr., 301, 302;

Garner v. Marshall, 9 Cal. 268;

Hanson v. Armstrong, 22 Ill. 442.

IV. THE BILL IS WITHOUT EQUITY, BECAUSE IT FAILS TO SHOW A MERITORIOUS DEFENSE TO THE ACTION IN THE STATE COURT.

In an action for relief against a judgment on the ground of fraud, it is imperative that the plaintiff show that he has a good defense to the original action. Otherwise there would be no avail in the exercise of extraordinary equitable relief against the judgment, for the same result would follow from another trial, and for the lack of such allegations, the bill is without equity.

Burbridge v. Rauer, 146 Cal. 21.

In the present case appellee does not allege either ownership, or any other present interest, in the property, either in himself personally or in the estate which he claims to represent. With great particularity he does allege that his intestate owned the property at the time of her death, and that he, her son, has been in possession ever since; but there is no statement from which it appears that the ownership or right of possession at the present time is with appellee. Under this condition of the pleading, it must be assumed that since the death of appellee's mother, the title has passed from her estate to the appellant Suter, in whose favor judgment went in the state court. We urge this defect in the bill because, if there had been any allegation of title, we would be prepared to show that as to a large part of the property, whatever title was held by the estate of Anna Maria Krueger has come to the appellant Suter by proceedings separate and

distinct from the foreclosure proceedings alleged in the bill. In any event, the defect in appellee's pleading in this respect is so serious as to call for its dismissal.

To remedy this defect, appellee has attempted to plead defects in the foreclosure decree which is one of the sources of title of appellant Suter. But there is no allegation that her title comes solely through the foreclosure decree, so that this point is not adequately met. As far as the alleged defects in the foreclosure proceedings are concerned, it appeared upon the hearing that the allegations of the bill in this regard, so far as material, were false.

The allegation that appellee has stated the facts to certain attorneys, and has been by them advised that he has a good defense, is not a sufficient allegation that he actually *has* such a defense.

Eldred v. White, 102 Cal. 600.

V. THE ORDER GRANTING THE INJUNCTION IS ERRONEOUS BECAUSE IT STAYS PROCEEDINGS IN A STATE COURT.

If any of the points thus far urged are good, the bill must be dismissed, and this proceeding terminated. If, however, the court should for any reason be of the opinion that the bill states a cause of action in equity, still the order granting the injunction is erroneous in several respects.

In the first place, it is in violation of section 265 of the Judicial Code (36 Stat. L. 1162), which is a re-enactment of section 720 of the Revised Statutes, and which provides as follows:

“The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.”

It may be admitted at the outset, that under the recent decision of *Simon v. Southern Railway Co.*, 236 U. S. 115; 59 L. Ed. 492 (settling what was therefore a disputed question in the federal courts), a federal court may enjoin a party who has obtained judgment by fraud from making an inequitable use of that judgment. But in the present case, the injunction runs, not merely against the successful party in the state court; but also against its officer, the appellant Eggers, who is the sheriff of San Francisco, and who, the bill alleges, is about to execute a writ of possession from the state court and thereby dispossess appellee. The prayer of the bill is that an injunction issue that “said defendants, and each of them, do not further take or cause to be taken, any further steps in the proceedings or premises” (trans. p. 18), and the order appealed from is “that defendants be restrained as prayed for in the bill” (trans. p. 72). The injunction, then, is one against the officer of the state court, forbidding him from executing the process of that court.

Under Revised Statutes, sec. 720, and its reenactment in section 265 of the Judicial Code, a federal court, while it may enjoin a party from inequitably taking advantage of a judgment of a state court, may not issue an injunction against any officer of the state court, nor may it interfere with the execution by such officer of the process of the state court.

Sargent v. Helton, 115 U. S. 348;

Leathe v. Thomas, 97 Fed. 136;

Phelps v. Mutual Reserve Co., 115 Fed. 956;

Evans v. Gorman, 115 Fed. 399;

Security Trust Co. v. Union Trust Co., 134 Fed. 301;

Dodds v. Palmer Tunnel Co., 188 Fed. 447.

VI. THE ORDER GRANTING THE INJUNCTION WAS ERRONEOUS, BECAUSE IT WAS ISSUED WITHOUT REQUIRING SECURITY OF APPELLEE.

By Act of Congress of October 15, 1914 (38 U. S. Statutes at Large, 738), it is provided:

“Sec. 18. That except as otherwise provided in section 16 of this act (which has no application to the present case), no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.”

In the present case, the interlocutory order of injunction of August 19, 1915 (pages 71 and 72 of the transcript), makes no provision whatever for any security, and is therefore in clear violation of the statute. The injunction keeps the appellant Suter from the enjoyment and possession of property which appellee states to be worth \$18,000.00; and if upon the trial it should appear that appellee was not entitled to the injunction, the appellant Suter would be damaged to the extent of the value of the use of the land for a long period of time, and also the amount of her costs and expenses in this litigation. Appellee himself is insolvent, judging from the allegation of the bill that he has been "without money to employ legal aid" (trans. p. 9). The denial of the statutory right to security upon the injunction therefore worked a serious injury to the rights of appellant Suter, for which the only remedy lies in the reversal of this order.

The right of the defendants to security is so clear that when the temporary restraining order was made, upon the filing of the bill, on July 30, 1915, an undertaking in the sum of \$1,000.00 was required of appellee and was furnished by him. This undertaking (set out at pages 22 and 23 of the record) is by its terms restricted to the damage resulting from the temporary restraining order of July 30th, and so expired when the order to show cause was heard, and the new injunction of August 19th was issued. It is obvious that the company executing the bond of July 31st could not be held

for a violation of the later injunction of August 19th, which is broader in its terms than the restraining order, and that therefore this bond is no protection to appellant Suter; and it is equally obvious that if it was proper to require a bond of \$1,000.00 on a restraining order which was to last for ten days, a far more substantial undertaking should be required where the appellant is to be kept out of property awarded to her by judgment, for whatever time may elapse until decision is rendered herein.

While the provision in the federal statute is a new one, and, so far as we are able to learn, has not yet been the subject of judicial interpretation, the language of the statute is so clear and unmistakable that no interpretation is necessary. In those states where a similar statute has been in force, it has been uniformly held that the requiring of a bond is a prerequisite to the granting of the injunction, and that if the bond is not required, the order granting the injunction must be reversed, though plaintiff would be otherwise entitled to it.

McCracken v. Harris, 54 Cal. 81;

Neumann v. Moretti, 146 Cal. 31.

It is equally clear that the bond on the temporary restraining order does not in any degree satisfy the statute. The case of *State v. Green*, 48 Neb. 327; 67 N. W. 162, had to do with a similar statute. In that case, a bond had been required and given on the temporary restraining order; and later a temporary injunction was granted, and the old bond

was ordered continued in force (a stronger case than the present one, because here the old bond was not ordered to stand). The court held that this was no compliance with the statute, saying:

“Not only is there no statute which authorizes a court or judge to make an order dispensing with the giving of a bond in granting a temporary injunction, or to require that a former bond shall stand, but, if the requirements of the legislature mean anything, or are to be observed and enforced, a new bond should have been required of and given by the relator, to make the injunction effectual.”

And the bond on the temporary restraining order is no protection at all to the appellants. It was so held in a case practically identical on this point, *Moulton v. Cornish*, 33 App. Cas. D. C. 228. There suit was brought on an undertaking given for a temporary restraining order, which, upon being brought on for hearing, was continued until the trial. The court held that the surety was not liable for any damages accruing from the time when the temporary restraining order was ordered continued *pendente lite*, and thereby became an injunction not within the terms of the bond. In the present case, the temporary restraining order was not merely continued in force, but was enlarged in its scope by the injunction order appealed from. It follows that appellant Suter has been deprived of the right to security given her by the statute, and that therefore the order granting the injunction was erroneous, and must be reversed.

VII. THE ORDER GRANTING THE INJUNCTION WAS ERRONEOUS, BECAUSE NOT SPECIFIC IN ITS TERMS.

Section 19 of the Act of October 15, 1914, referred to above, provides as follows:

“That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained. * * *” 38 Stat. at Large 738.

The order appealed from is as follows:

“The application of plaintiff for an injunction *pendente lite* having been, upon due notice to the defendants herein, argued and submitted to the court, it is ordered that said application be granted, and that defendants be restrained as prayed for in the bill, until the trial and final determination of the cause” (transcript, pp. 71, 72).

This order does *not* set forth the reasons for its issuance, is *not* specific in its terms, and does *not* describe in reasonable detail the acts sought to be restrained, but *does* describe them only by reference to the bill of complaint. It therefore violates in every respect the provisions of section 19 quoted above. The impropriety of such a general order is especially striking where, as here, the bill prays for an injunction against the officer of a state court in the execution of its process.

VIII. THE COURT ERRED IN GRANTING THE INJUNCTION, BECAUSE IT APPEARED ON THE HEARING THAT THE JUDGMENT IN THE STATE COURT WAS NOT OBTAINED BY FRAUD, AND THAT APPELLEE WAS BOUND BY ITS FINDING AS TO HIS COMPETENCY.

As already stated, the appellants, in response to the order to show cause, made a full showing as to the allegations in the bill, and it is submitted that from the facts disclosed at the hearing, it fully appeared that appellee was not entitled to the injunction granted. The facts established were uncontroverted by him, in any material respect, and furnished such a complete answer to the charge of fraud that there is no room for the application of the rule allowing the trial court to pass upon contradictory statements of fact, in applications for interlocutory orders.

1. *As to the competency of the appellee.* Much is said in the bill about the sanity and competency of the appellee. On this fact the affidavits are, it is true, conflicting (see affidavit of Edward C. Harrison, p. 46; affidavit of Otto tum Suden, pp. 100-104, declaring him incompetent, and affidavit of Warner Temple, pp. 69, 70, indicating the contrary opinion) and although the preponderance of the testimony is against him on this question, nevertheless the whole question is foreclosed by the proceedings in the ejectment suit which are under attack. For it appears, by uncontradicted testimony, that on three separate occasions in the ejectment suit, the state court held him to be incompetent, and that on each of these occasions appellee had the

opportunity to be heard. In the first place, that court made on September 17, 1913, its order that appellee show cause on October 2, 1913, why a guardian *ad litem* should not be appointed because of his incompetency. This order was duly served, and after a hearing it was adjudged that appellee was incompetent and a guardian *ad litem* appointed (trans. pp. 29, 30). Such was the first adjudication of incompetency. Later, upon the trial of the cause, on December 9, 1913, the appellee August F. Krueger "was called as a witness for the plaintiff Sophie Suter, but upon the objection of his guardian *ad litem*, that he was incompetent to testify, he was examined by the court as to competency, and held incompetent, and withdrawn as a witness". Such was the second adjudication of incompetency, made in the presence of appellee and while he had every opportunity to protest. Finally, appellee appears after judgment has been entered against him, and through his attorney Arthur Crane, moves the court, on August 5, 1914, to set aside the proceedings against him, on the ground, among others, that he "is neither an infant nor insane, nor has been during the pendency of "the ejectment action. The motion is made before the state court upon the affidavit of appellee and another person respecting his sanity, and is opposed by counter-affidavits on the point; and the court, after considering the motion, denies it on August 17, 1914. (These proceedings are set out in full at pages 38 to 46 of the transcript.) Here, for the third time, in the action under

scrutiny here, the court, after notice and hearing, adjudicates appellee to be incompetent. In the face of these facts, it needs no argument to show that appellee cannot now, for the purpose of attacking these very proceedings, claim that the state court was in every instance wrong, merely because it suits his purpose so to do. In none of these instances is there the slightest shadow of a claim that the court was improperly influenced in its decision, and for the purpose of passing upon the validity of these proceedings, appellee must therefore be treated as an incompetent person.

2. *As to the alleged fraud of appellants.* All the facts surrounding the compromise agreement between the appellee's guardian *ad litem* and the appellant Sophie Suter are set out in the affidavits of Edward C. Harrison and Otto tum Suden, contained in the record. No question is made that on the first trial of the ejectment suit, the guardian *ad litem* took advantage of every point in favor of his ward; and indeed no such question could be made, for the guardian *ad litem* depended for his testimony upon Warner Temple, who now appears as attorney for the appellee. The testimony adduced on this first trial is set forth at pages 78 to 89 of the record. After the cause was submitted, the trial court rendered judgment for the appellee, the defendant in the ejectment suit. Thereafter in due time under the state statute, the plaintiff therein (the appellant Sophie Suter) moved the court for a new trial, and for the purpose of such motion, a

bill of exceptions was settled which was in all respects fair, full and correct (p. 98). From this bill, the guardian *ad litem* noticed for the first time that the judgment for appellee was erroneous in this respect: the witness Temple had testified that an appeal from the judgment of foreclosure was pending at the time the order setting aside that judgment was made (see testimony of Temple at the ejectment trial, p. 85: "I then filed a notice of appeal from the judgment, and gave \$300 bond"). If this was true, and appellee's own lawyer said it was, then the order purporting to set aside the foreclosure decree was made in excess of the jurisdiction of the superior court, during the pendency of an appeal, and was absolutely void. An order cannot be made vacating a judgment as void, while an appeal is pending.

Parkside Co. v. McDonald, 167 Cal. 342.

An appeal having been taken must be presumed to be still pending.

People v. Durant, 119 Cal. 54.

The guardian *ad litem* also realized that if the order of the superior court setting aside the foreclosure decree was void for lack of jurisdiction, he could not hope to successfully attack the decree of foreclosure itself. It had developed on the trial that the only defect in the decree was the mere irregularity that the answer of defendant Farnham had not been filed. It had, however, been served, which constituted an appearance under the California law; and in addition, Farnham's attorney had

personally appeared at the trial and participated therein (see testimony to that effect of Geo. A. Clough, attorney for the Hibernia Bank, set out at pages 86 to 89 of the record). That this appearance was fully sufficient to give the court jurisdiction over the defendant's person could not be open to question.

Estate of Johnson, 45 Cal. 257;

Foley v. Foley, 120 Cal. 33, 39.

Thus the guardian *ad litem* found himself confronted with litigation in which he could not reasonably hope to be successful. Moreover, he knew that even if he did succeed in again securing judgment for his ward, the litigation would not be ended there, but would be prosecuted further, and his client had no means with which to defray the costs of this litigation. Meanwhile, the court had granted the new trial, as indeed it was bound to upon the law and facts above stated. Suppose, on the other hand, that appellee could succeed in obtaining a judgment in the ejectment action; he would still be confronted with the foreclosure of the mortgages of which appellant Suter was the owner or equitable assignee; and even if appellee were held to be the owner of the property, such ownership would be subject to such heavy liens against the property, that the equity of appellee was amount to little or nothing (see statement of liens against property, in affidavit of Edward C. Harrison, pp. 34 to 36). As a matter of duty to his ward, and in what must be held to be the highest good faith towards his inter-

ests, negotiations were opened between the guardian *ad litem* and the attorney for appellant Suter looking to a settlement of the controversy, in order that something might be saved therefrom for the appellee. The parties finally agreed upon the sum of \$1500.00, which the guardian *ad litem* considered was the full value of any equity appellee might have, even if he prevailed in the litigation. The consideration which prompted the guardian *ad litem* to make the compromise are set forth in his affidavit in detail, at pages 95 to 101 of the transcript. He expressly states that the attorney for appellant Suter was fair in his conduct of these negotiations; and the record may be searched in vain for any evidence of overreaching or misrepresentation on the part of either party to the bargain.

Subsequently trial was had for the second time, and judgment passed for appellant Suter, which judgment is now being enjoined by the order appealed from. Now the fact is, that the second trial was had upon the stipulation of the parties that the court might consider before it all the evidence adduced on the first trial, and the court, having had its attention called to the invalidity of the order setting aside the foreclosure because of the pendency of an appeal, ordered judgment for the plaintiff therein and against the appellee. Thereupon a petition was filed setting out the compromise agreed upon (set out at pages 90 and 91 of the transcript), the compromise and all the considerations leading up to it were fully explained to Judge

Sturtevant, who had presided at the first trial (transcript, p. 37), and he made an order approving the compromise, under the power vested in him by section 372 of the Code of Civil Procedure, which is hereinbefore set forth.

Every circumstance, every fact disclosed, regarding the settlement, indicates the highest good faith towards the incompetent ward. There are but two suggestions made in appellee's affidavits which might be considered as evidencing a different state of affairs. One is that the guardian *ad litem* did not consult his ward about the settlement which was being negotiated. However, this is fully met by the affidavit of Mr. tum Suden, the guardian *ad litem*, wherein he states that the incompetency of his ward was so marked, as indicated by his surroundings at home, his manner of speech, his insane delusion that everybody was in a conspiracy against him, and his refusal to take care of his affairs, including his allowing judgments to go by default against him (see pp. 95, 96, 99, 100, 101, 102, 103, 104). To attempt to reason with such a half-crazed, irresponsible person was but time lost; and the proper and natural course was rather to explain the situation and the compromise to the court, which under the law was charged with the duty of looking after the interests of such incompetents as the appellee.

The other suggestion of impropriety made on behalf of appellee is that Mr. tum Suden, the guardian *ad litem*, was paid out of the compromise money, the sum of \$250.00 for his services. It

appears that after the compromise had been made and approved by the court, and after the money had been paid over and the guardian had released errors in the judgment, the court then, upon his application, found that the sum of \$250.00 would be reasonable compensation, and ordered it paid as such compensation out of the compromise money. In the first place, it is hard to see how any acts of the guardian *ad litem* could vitiate the settlement as against appellant Suter, after she had paid the money and it had been executed as between her and the guardian. But beyond that, no reason appears why this sum of \$250.00 is not only reasonable, but exceedingly moderate for the services of the guardian *ad litem*. The court had the power to order the disposition of the fund; there is no claim that the judge was imposed upon, or that any facts were misstated to him; and in short, the whole transaction carried on, as it was, in the open and with no attempt at concealment, bears every ear-mark of the most proper motives.

For want of a better basis for a claim of fraud, appellee's counsel may urge as an indication of fraud that although a judgment had already been rendered in his favor, his claim was settled for a small proportion of the value of the property. It is a sufficient answer to this argument to point to the record which was before the state court, from which it was clear to the guardian *ad litem*, and equally clear to the state court, when it came to pass on the motion for new trial, that the first judgment

was erroneous upon the testimony adduced. That testimony is in the record, and it will be apparent upon perusing it that the state court was obliged to grant the motion for new trial, because the foreclosure decree was valid, and the order setting it aside in excess of the court's jurisdiction because made pending appeal. Not only was the order granting a new trial correct, but on such new trial, a judgment for appellant Suter would have been inevitable, and the only practical question for consideration by the guardian *ad litem* was how something might be saved for his insane ward out of what was admittedly only an interest subject to liens well-nigh aggregating the value of the property itself.

From the foregoing facts it is submitted that the district court erred in the issuance of the injunction, because the allegations of the bill, in so far as they were directed at the subject of fraud, were controverted by unmistakable and convincing evidence.

IX. THE COURT ERRED IN GRANTING THE INJUNCTION, BECAUSE IT APPEARED THAT APPELLEE HAD ATTACKED THE JUDGMENT IN THE STATE COURT ON THE GROUND HERE URGED; AND THE FAILURE OF SUCH ATTACK PRECLUDES HIM IN THIS SUIT.

Reference has already been made to the motion made by appellee in the ejectment suit on August 7, 1914, before the state court, by which he sought to have set aside the proceedings here complained of.

And we have already called attention to the statute, section 473 of the Code of Civil Procedure of California, under which this motion could be made on all the grounds urged by appellee here. From the papers used on the motion, it appears that it was based on the alleged competency of appellee, on the want of authority of the guardian *ad litem* to act for him, on the claim that the court was not advised regarding the facts surrounding the compromise; and it further appears from the affidavit of Krueger used on said motion, that his prior ignorance of the settlement, and of the allowance of a fee to the guardian *ad litem*, were also brought to the attention of the court. It is to be noted that this motion was made by a separate attorney, and in hostility to the guardian *ad litem*. After hearing on conflicting affidavits, the court, on August 17, 1914, made its order denying the motion (pp. 38-46).

The appellee, then, not only had a plain, speedy and adequate remedy at law; but he took advantage of that remedy, and after full hearing, the state court held that his claims were without merit. Therefore, on elementary principles of *res adjudicata*, appellee is now without any standing in this new suit based upon the same grounds.

Hendrickson v. Bradley, 85 Fed. 508; *certiorari* denied, 171 U. S. 686;

Folsom v. Ballard, 70 Fed. 12;

Travelers' Assn v. Gilbert, 111 Fed. 269, 276.

In these cases, suits for relief against judgments on the ground of fraud were before various Circuit

Courts of Appeals; and it was held in all of them that where the complainant had, by motion in the state court, raised his objections before the court which had rendered the judgment, and where that court was empowered to relieve against the judgment, but had, after a hearing, denied his motion, he was then precluded from asking in the federal courts for relief against the same judgment, on the grounds already urged, or on any grounds that might have been urged, in support of the motion in the state courts. This, of course, is the necessary corollary of the rule of *Nougue v. Clapp*, which denies relief where there is an adequate remedy at law, and it furnishes the final and conclusive answer to appellee's claim for injunctive relief.

It is respectfully submitted that the order and interlocutory decree should be reversed, and the bill dismissed.

Dated, San Francisco,
March 8, 1916.

EDWARD C. HARRISON,
MAURICE E. HARRISON,
Solicitors for Appellants.

No. 2681.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

FREDERICK EGGERS, as Sheriff of the City
and County of San Francisco, California,
SOPHIE SUTER, SOPHIE SUTER, as
Executrix of the Will of Daniel Suter,
Deceased, and OTTO TUM SUDEN,

Appellants,

vs.

AUGUST FERDINAND KRUEGER (otherwise
Kruger), Administrator of the Estate
of Anna Maria Krueger (otherwise
Kruger), Deceased,

Appellee.

Upon Appeal from the United States District Court for the
Northern District of California, Second Division.

Reply Brief for Appellee.

WARNER TEMPLE,
Solicitor for Appellee.

M. H. FARRAR,
Of Counsel.

Filed

Filed this.....day of March, 1916.

MAR 20 1916

F. D. MONCKTON, Clerk. **F. D. Monckton,**
Clerk.

By....., Deputy.

No. 2681

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of Anna Maria Krueger (otherwise
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Appellee.

REPLY BRIEF FOR APPELLEE.

STATEMENT OF CASE.

This is a suit in Equity to enjoin the enforcement of a Writ of Possession, by appellants, issued out of a State court, in a judgment obtained therein, in a

suit in ejectment, between appellant Sophie Suter, as Executrix of the Will of Daniel Suter, deceased, against August Ferdinand Krueger (otherwise Krueger), as an individual, and, further, to enjoin each of the appellants from asserting claim or right of possession, under said judgment to or in the real property described in appellee's bill.

Anna Maria Krueger (otherwise Kruger), the mother of appellee, died, intestate, in May, 1902, in the City and County of San Francisco, State of California, leaving certain real property, in said city and county, upon which there were two mortgages, one, to the Hibernia Savings and Loan Society of San Francisco, and the other to Daniel Suter, a lawyer. The bank's mortgage was a first mortgage. After her death, John Farnham, the public administrator of the City and County of San Francisco, was appointed administrator of her estate, though appellee was living with said deceased, at the time of her death, in their home upon said real property, and he was not informed of such proceedings.

In November, 1902, said bank brought an action to foreclose its mortgage, joining Farnham, as administrator of the Estate of Anna Maria Krueger (otherwise Kruger), deceased, and, said Daniel Suter. Said Farnham did not appear, by answer or otherwise, in said action, and judgment, sort of "pro forma by default" (Record, p. 87) was given the bank. The decree of foreclosure recited that said Farnham had

appeared, and, that summons had been served upon him, and, that he had filed in the court his answer. Thereafter, at the Commissioner's sale under foreclosure, on July 8, 1903, said Daniel Suter bought in said real property, paying the bank's claim, and receiving a Commissioner's Certificate of Sale.

Appellee, for said estate and, for himself, as heir of his mother, during all this time, was in possession of the real property, and continues in the possession thereof.

About two months before the time to *redeem* (not appeal,—the time to appeal having long elapsed) under the sale at foreclosure, appellee discovered that Farnham was administrator of his mother's estate, and, that the bank had foreclosed its mortgage and the property bought in by said Suter. Appellee then called upon Warner Temple, Esq., explained to him the case, and asked said Temple to assist and make arrangements to *redeem* said property. As Krueger (otherwise Kruger) was without money, it was necessary to investigate the foreclosure record to ascertain the condition of the action, and the title to the property. Said Temple immediately looked over the records in said foreclosure action, and found that no summons had been returned to the Court, nor, was there any affidavit of service of summons being served on said Farnham, nor, was there any answer of said Farnham, on file, in said foreclosure action, in the papers in said case, in the office of the County Clerk,

though the decree recited that summons had been served on Farnham, and return of service filed in the clerk's office, and, that said Farnham had filed his answer to said action to foreclose, for said Anna Maria Krueger (otherwise Kruger), deceased.

Appellee, August Ferdinand Krueger (otherwise Kruger) was substituted as administrator of the estate of said Anna Maria Krueger (otherwise Kruger), in the place of said Farnham, and, immediately thereafter, through his attorney, said Warner Temple, made a motion in the foreclosure proceedings to set aside the decree of foreclosure on the grounds of defects apparent on the face of it, and, for want of jurisdiction in the Court to make the decree (Record, p. 81). Daniel Suter asked leave, in resisting the motion, to file for said Farnham, an unverified general denial answer, *nunc pro tunc*, said answer to be read as a pleading to the bank's complaint for foreclosure, in the decree rendered. This was objected to by Mr. Temple, but, over such objection, Judge Hebbard made the order permitting the said answer, proposed by said Suter, to be filed *nunc pro tunc*, and, further, denied said Krueger's (as administrator) motion to vacate the said decree. This, being an order made after judgment, and, an appealable order, Temple, for Krueger, as administrator, gave notice of appeal, and filed bond on appeal, in the sum of \$300.00, from the said order of Judge Hebbard refusing to vacate the said faulty and void decree of foreclosure, and,

the order permitting the said answer to be filed *nunc pro tunc*. When Temple presented his *Bill of Exceptions*, to support Krueger's appeal from said order, for settlement, said Suter being present (Record, pp. 81, 82, 83 and 85), Judge Hebbard remarked that he evidently had no jurisdiction to make the decree of foreclosure (Record, pp. 60 and 83), and refused to settle the Bill of Exceptions and then directed Mr. Temple to renew Krueger's motion to vacate the said faulty and void decree. The motion was again made and granted, in Suter's presence. From the order setting aside said decree of foreclosure, Suter did not appeal, and during his lifetime thereafter (a period of some seven and one-half years), took no steps regarding the same. In January, 1910, said Daniel Suter wrote offering \$1750 to buy Krueger's interest in the property (Tr., p. 64).

Before the decree of foreclosure was set aside, Suter had obtained a deed to said real property from the Commissioner. But, the motion to set aside said decree had been made before said deed was given Suter, and, also, before the *time to redeem* had passed.

As the law requires the performance of no useless act, said appeal of Krueger was abandoned by mutual consent between said Krueger and Suter.

There was never an appeal from the *judgment* of foreclosure in the bank's action, (as set out at page 10 of appellants' brief, and, as is incorrectly stated on page 99, Record).

Daniel Suter died in San Francisco, in 1913. His widow, Sophie Suter, was appointed executrix of his Will. Thereafter (August 5, 1913) she brought an action *in ejectment* against August Krueger (otherwise Kruger) *as an individual*. Krueger, being without means, and, after receiving from the Court additional time to plead, filed an answer, drawn by himself, to said ejectment suit, claiming possession and asserting a title adverse to Daniel Suter, in his mother, said Anna Maria Krueger, deceased (Record, p. 52). Thereafter, Mrs. Suter's attorney asked that a guardian *ad litem* be appointed for Krueger, asserting *his* belief that said Krueger was incompetent to handle his own affairs, or to defend himself, and suggested that said Otto Tum Suden, a lawyer in San Francisco, be appointed as such guardian (Record, pp. 29, 95). Otto Tum Suden was appointed guardian, giving *no bond* or *security*, and filed two answers in said ejectment suit, one answer setting up general denials only, and then an amended answer, setting up as a defense the Statute of Limitations. The action (ejectment) was tried December 13, 1913. All the facts of the said foreclosure judgment were given to said Otto Tum Suden by said Krueger and said Temple. Said Temple appeared at the trial of the ejectment suit and testified. After trial, the case was submitted, and in March, 1914, *judgment was rendered in favor of said Krueger, denying that said Estate of Daniel Suter had any interest in the said real property of*

said *Anna Maria Krueger, deceased*. All the parties to the action, as well as the evidence and testimony given at the trial, were before the trial judge. Thereafter, without consulting with Krueger, or with Temple, Otto Tum Suden consented to a new trial of the action, unknown to, and, without either Krueger or Temple being in court, or called for additional testimony, or to explain any testimony given at the December trial, and, no further testimony given, and, upon the approval solely of said guardian *ad litem*,—he concurring with and aiding, *against his ward*, the said attorney for Mrs. Suter, and Mrs. Suter,—and by deception on the Court, as to the truth of the situation, and, without fully and completely informing or advising the Court, the Court set aside the said judgment in favor of Krueger, and caused to be entered a second judgment in favor of Mrs. Suter (July 11, 1914), notwithstanding that Mrs. Suter had appealed from the judgment of March, 1914, and that appeal was pending and not disposed of.

Between March, 1914,—when the State Court gave judgment, in the ejectment suit, in favor of Krueger, and July 11, 1914, when said Court, on the statements made to it by Otto Tum Suden and Mrs. Suter's attorney, both acting for one purpose, entered judgment against Krueger and for Mrs. Suter,—the attorney for Mrs. Suter had filed a motion for a new trial (Record, p. 34) and gave notice of appeal, and settled a bill of exceptions on this appeal. There

has never been a dismissal of this appeal. No argument was had on the motion for a new trial. Also, during this time, negotiations were had between Tum Suden, Mrs. Suter and her attorney, whereby it was agreed that Mrs. Suter should pay \$1500.00, *as a compromise of Krueger's claims*, (Mrs. Suter's husband, before his death, had offered \$1750.00 for the same claims, Tr., p. 64), also that the said Tum Suden, by virtue of his supposed authority as said guardian *ad litem*, would consent to the granting of the motion for a new trial, and, of judgment being entered in favor of Mrs. Suter, and waive all errors and right of appeal from such judgment. Pursuant to such agreement, Mrs. Suter's attorney and said Tum Suden appeared before the Court and said Tum Suden, aiding and abetting the said Suter attorney, consented to the granting of the motion for a new trial, and prevailed upon the Court to enter said judgment of July 11, 1914, against said Krueger. And, to bind this act, and, to as effectually as possible oust Krueger, under a legal cloak, Tum Suden, as said guardian *ad litem*, presented to the Court a petition praying for leave to compromise said litigation for said sum of \$1500.00 on the ground that Krueger was poor, without money, and unable to bear further litigation, and that he had no rights in said property anyway, and thereont Tum Suden asked for compensation in the sum of \$250.00 for his services as guardian *ad litem*; and, on the same day as said petition was presented for compromise (Record, pp. 90, 91.

92), and, without said Krueger being in Court, or in anyway advised of the proceedings, the Court heard the petition and gave its order of compromise and allowance of attorney's fees as prayed. By this compromise, said Tum Suden, as guardian *ad litem* of Krueger, an individual, disposed of the rights of Krueger, as administrator of the estate of Anna Maria Krueger, deceased. Krueger is still the administrator of the estate of his mother, no order revoking his letters of administration having been made, and, the estate being still in course of administration, unsettled, and not distributed, and no provision or order made for the payment of the charges and fees of administration, the same being still unpaid.

Tum Suden, as guardian *ad litem*, was an officer of the Court, in whom the Court reposed confidence, and, it is this confidence of the Court in its officers, abused by Tum Suden, that caused the Court to believe the statements made to it, and to give the order granting a new trial, and, to enter judgment for Mrs. Suter, and to grant the order of compromise, on the theory that it was for the best interests of Krueger, and, that it was sufficient payment to him, *for his equity in said property*, if the amount claimed as due by Mrs. Suter (Record, pp. 35 and 36) is true, and, to prevent further litigation. This statement of the amount due from the Krueger Estate to the Estate of Suter is denied by Krueger; also, the value of \$15,000.00, placed upon said property by Mrs. Suter

is denied, the value claimed being at least \$18,000.00. Under the mortgages foreclosed by the bank, and the Suter mortgage, *the mortgagee had to pay all taxes*, and these were not chargeable to Krueger, nor could they become a lien upon the property. Under these same mortgages, it was provided that any assessments paid by the mortgagees, was but an extra charge, drawing interest in the same manner as the principal of the mortgage. Then, too, Suter never having asserted claim to said property for more than five years, said Krueger being in possession thereof, and living thereon continuously, any claims, otherwise than his mortgage debt, are barred by the Statute of Limitations, though Krueger has always wished to pay his just debt to Suter, without resort to the statute of limitations, and is still willing to do so.

In August, 1914, immediately after said judgment of July 11, 1914, was entered in said ejectment suit, Krueger, through another attorney (Record, pp. 39, 40) filed his motion to have said judgment, and all other papers filed and signed by said guardian *ad litem*, set aside. This motion was denied, August 17, 1914. Thereafter, appellants caused to be issued a Writ of Possession of said property, and placed the same in the hands of said defendant Eggers, and he, as sheriff of the City and County of San Francisco, forthwith proceeded to execute the same, and oust said Krueger from said property.

Thereafter, said Krueger filed in the District Court

of the United States, Northern District of California, a Bill in Equity, No. 131. On the hearing of the Order to Show Cause therein, and, the motion to dismiss said bill by the defendants, the Court granted the motion to dismiss said bill without prejudice, the learned Judge asserting that the bill showed a cause of complaint, but was incomplete in the allegations. Immediately thereafter, a new Bill in Equity, No. 197, was filed and, on the hearing of appellants' motion to dismiss this Bill, and the order to show cause why a temporary injunction should not issue, an order was made granting an injunction *pendente lite*, and, it is from this order that appellants now appeal.

It is called to the attention of this Court that, though the order of the Superior Court allowing Guardian *ad litem* compensation, etc. (Record, p. 93), directs said guardian to pay the sum of \$1250.00 to said Krueger, by depositing the same in the German Savings and Loan Society to the credit of said August F. Krueger, and subject to his order, yet, in fact and truth, said guardian has not complied with said order, and has not paid said sum of money into said bank, but, has retained the same in his possession. It is well also to note, that the said sum of money, by way of alleged compromise, has neither been paid into Court, nor, to said Krueger.

It is also called to this Court's attention that, in the statement of items of the amount claimed due to appellants (Record, pp. 35, 36), said \$1500.00, alleged compromise is charged to said Krueger, and,

also, interest thereon, though he has never had the same, nor had the usufruct thereof.

Appellants disingenuously make much of the alleged testimony of Mr. Temple, as set forth in the transcript of the testimony at the trial in the ejectment suit, to wit: that he "filed a motion of appeal from the *judgment* of foreclosure," though the reading of the testimony (Record, pp. 79 to 86) demonstrates that there could not have been any appeal from the judgment (i. e. of foreclosure) as the time within which to appeal had expired several months prior to the date when Krueger first called on Temple to ask aid to *redeem* the property. The testimony, at the December trial of the ejectment suit, given by Mr. Temple, after it had been transcribed, was not submitted to said Temple for his approval or correction, and, if it had been so submitted, the error of "appeal from the *judgment*," instead of *appeal from the order of Judge Hebbard refusing to vacate the said judgment of foreclosure because it was void, and, permitting the filing of the answer nunc pro tunc*, would not be in the transcript. Nor, was the testimony, as set forth in the transcript of testimony at the ejectment suit, and alleged to be that of Mr. Temple, called to the attention of Mr. Temple for approval or correction, by said Otto Tum Suden, when he settled the bill of exceptions presented and filed by the attorney for Mrs. Suter, on her appeal from the judgment given in March, 1914, in favor of Krueger. Therefore, Krueger calls this to the Court's attention.

ARGUMENT.

The trial court did not err in granting the injunction upon the facts proved. The trial court listened to the argument of appellants, and considered the points and authorities presented by appellants and appellee.

The allegations of the Bill sufficiently show equity, and it is with equity, and should not be dismissed, nor, should the order granting the temporary injunction be reversed, and, the appellee should be permitted to have his suit disposed of, on fair trial and proofs.

The Bill in this case has been heard but once; the injunction, *pendente lite* was granted, on the hearing of appellee's order to show cause why said injunction should not issue and on the motion to dismiss said bill by the appellants. If the Bill is without equity yet, by amendment, is capable of being made with equity, the Bill should not be dismissed or disallowed, but the Bill be ordered amended; (Act of March 3, 1915, Chap. 90, Vol. 38 (Part 1), U. S. Public Laws, p. 956). The appellants, at the time said injunction was granted, had not filed answers to the Bill nor was a full hearing had on the pleadings and proofs. The case of *Smith v. Vulcan etc.*, 165 U. S., 518, cited by appellants, is a case where an interlocutory injunction was granted after answer and replication filed and a full hearing on the pleadings and proofs had,—in short the case tried,—and it is there held by this that, if, after such condition, the Bill is without equity, it shall be dismissed. To the

same effect are the other cases cited by appellants on the point, that the Circuit Court of Appeals, on an appeal from an interlocutory order, *may*, if it is of the opinion that the Bill is without equity, order its dismissal.

Mast v. Stover etc., 177 U. S., 495, is authority for the proposition that, "if the bill be obviously devoid of equity upon its face, and such invalidity be incapable of remedy by amendment," the bill should be dismissed. Appellee contends that this bill, on its face, shows that he is entitled to equity and that the bill is with equity and if the bill is without equity, yet it is not incapable of being cured by amendment of the bill.

Mast v. Stover, page 494, holds further that the power of the Circuit Court of Appeals to order the dismissal of the bill before answer filed, or proofs taken, upon appeal from an order granting a temporary injunction, is not concluded by the case of *Smith v. Vulcan etc.*, 165 U. S., 518, cited by appellants.

All the decisions upon this proposition point out that, if plaintiff's bill be defective, yet capable of correction by amendment, such amendment will be allowed and the case tried on its merits and the order granting the injunction be permitted to remain in force until the case is disposed of.

It is submitted that, if this Court be of the opinion that appellee's bill is without equity, but capable of

being corrected by amendment, the bill should not be dismissed, but allowed to be amended and the plaintiff to maintain his suit (Act of March 3, 1915, Chap. 90, Part I, Vol. 38, U. S. Public Laws, p. 956).

We confidently and respectfully submit to this Hon. Court this argument, namely: That the interlocutory restraining order and injunction be upheld and the bill itself sustained, as this Court by means thereof are preventing the Suter interests from using the two State court unconscionable judgments (foreclosure decree, ^{and} ~~of~~ ejectionment), to extort money and property from appellee, who ^{ought} not in equity and good conscience to suffer it—and that a grievous wrong will be perpetrated on appellee if the Court of Equity does not act to protect appellee.

National Surety Co. v. State Bank, 120 Fed., 597;

Marshall v. Holmes, 141 U. S., 589-596.

I. The parties to this suit are of diverse citizenship, the appellee being an alien citizen of the Republic of Switzerland, while the appellants are citizens of the United States of America, residing in the State of California. This is not the case of citizens of different States, but of an alien citizen with citizens of a State in the United States of America. The bill alleges the citizenship of appellee and his mother; it also alleges that defendant Eggers is the Sheriff of the City and County of San Francisco, State of Cali-

fornia, but does not in so many words allege that said Eggers is a citizen of the United States of America. Yet, said Eggers, to be the Sheriff of the City and County of San Francisco, must be a citizen of the United States of America; as to the other defendant appellants, it is admitted that no allegation of citizenship is made; tho, from the bill, it can be argued that all of said appellants are citizens of the United States of America. But appellee well knows that the courts will not permit citizenship of either party to an action to be argued into the bill, so appellee, as it is possible to do so, asks that this Court permit said bill to be amended on the record pursuant to said Act of March 3, 1915, with an allegation of the citizenship of the appellants.

Amendment to show jurisdiction granted, see *Great So. Fireproof Ho. Co. v. Jones*, 177 U. S., 458.

II. The bill is with equity, because it shows that plaintiff had no certain, complete, prompt, efficient and adequate remedy at law. The bill shows that, Krueger's right to claim error in and to appeal from the judgment entered against him by consent of his guardian *ad litem* had been waived and lost to him. The bill further shows that he caused a motion to be filed in the court (rendering the judgment against him) asking that the said judgment be set aside; also, that all the orders signed and filed by the said guardian *ad litem* be set aside. This motion was denied. A writ of possession was in the hands of the Sheriff

and he was proceeding to execute the same on Krueger, which would have meant Krueger's being ousted from possession of his deceased mother's property, and the placing of the appellants in possession thereof. The necessities of the case, as by the bill set forth, demanded immediate, prompt, certain, complete and efficient remedy to be applied for and resorted to. To have appealed from the order refusing to set aside the judgment and the orders of compromise and waiver and release of appeal, would have taken too long, and not given Krueger that speedy, certain, complete, prompt and efficient remedy, to attain ends of justice, as would a remedy by the suit in equity. Further, the bill shows that Krueger made his application by motion, within a reasonable time, to-wit, a month, whereas, the Section 473 of the Code of Civil Procedure of California permits such motion to be made within six months.

The bill shows that Krueger had no adequate remedy at law; for, a remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party. *Bank of Kentucky v. Stone*, 88 Fed.

To refuse relief in equity upon the ground that there is a remedy at law, it must appear that the remedy at law is "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity:"

Boyce v. Grundy, 3 Pet., 210-215;

Sullivan v. R. R. Co., 94 U. S., 806-811.

And application of the rule depends upon the circumstances of each case:

Watson v. Sutherland, 5 Wall., 74-79.

In *Williams v. Neely*, 134 Fed., 1-10, "adequate
"remedy at law which will deprive a court of equity
"of jurisdiction is a remedy as certain, complete,
"prompt and efficient to attain ends of justice as
"remedy in equity."

Other decisions supporting this rule:

Thompson v. Allen County, 115 U. S., 550;

Peck v. Ayers, 116 Fed., 273, 274, 275, 276;

McMullen Lumber Co. v. Strother, 136 Fed.,
295;

19 *Cent. Dig. "Equity,"* Section 152;

Farwell v. Colonial Trust Co., 147 Fed., 480.

Plaintiff has no adequate remedy at law and his only relief is by equity. The complaint shows that plaintiff would be ousted from his possession of the said property, by reason of the Writ of Possession issued on the judgment, in the ejectment suit, obtained by fraud, conspiracy and collusion; and that such action, if permitted will result in the loss of the property of the estate of Anna Maria Krueger, deceased, to which plaintiff is the heir; thereby depriving appellee of his inheritance and property, and which property is still subject to the jurisdiction of the Probate Court; there having been no Decree of

Distribution; and no provision made for payment of deceased's debts, funeral and testamentary expenses, nor for the costs of administration fees and commissions by law allowed, which are a first charge and lien on the deceased property by the laws of California.

It is here submitted that the appellee, after having made his motion to vacate the ejectment-judgment rendered against him, BY CONSENT, and to vacate all the orders and waivers of errors and of appeal, (and such motion being made in less than thirty days after the entry of said judgment, and denied) has exhausted his law remedy, as well as having been deprived of his legal remedy, and that his only course, to obtain justice, is, by equity proceedings. It is further submitted that the appellee has in no way shown laches or delay; but on the contrary, has shown such activity in his effort to set aside the said fraudulent, collusive and "consent" judgment in ejectment, as is not usually found in a litigant of unquestioned mentality, let alone a man who is claimed (and this claim is only made by the parties against him), to be mentally wrong.

III. THE BILL IS WITH EQUITY, SHOWING THE JUDGMENT IN THE STATE COURT OBTAINED BY FRAUD.

The bill clearly shows that fraud, collusion and conspiracy to defraud were rampant in the procuring of the judgment in favor of Mrs. Suter, in the ejectment suit, on July 11, 1914. On March 4th, 1914,

in this same suit, after trial had, and the matter held under submission by the Court from December 13, 1913, to March 4, 1914, a judgment was given in favor of Krueger, and denying any interest in the Estate of Daniel Suter in the property of the Estate of Anna Maria Krueger. Otto Tum Suden, lawyer, had been appointed as the guardian *ad litem* of August Ferdinand Krueger as an *individual*, and *not* as the administrator of the estate of Anna Maria Krueger, deceased. The appointment of Krueger as administrator, was, as much a judicial determination that Krueger was not *non compos mentis*, as is the Court's appointment of Tum Suden as guardian *ad litem*, so claimed to be a determination of the condition of Krueger's mind. *Otto Tum Suden was the nominee of Mrs. Suter, and he was suggested to the Court by the attorney for Mrs. Suter; yet, Mrs. Suter was, at this time, the party plaintiff in an ejectment suit against Krueger. Her interest was not his, nor the interest of the estate of Anna Maria Krueger. The appointment was not made by the Court, on its own motion and suggestion, but moved by interests wholly hostile to Krueger. It was not from a desire to aid Krueger with competent legal help, in the ejectment suit, that a guardian ad litem was requested to be appointed; BUT from a desire to have the expected judgment in ejectment absolutely unassailable. And, further, it being suggested to the Court for the necessity of a guardian ad litem, it was for the Court*

to select such a person of its own choosing after due medical examination by expert alienists and, not a person suggested by the opposing side, for no reason than for its own advantage, without any expert testimony whatever by skilled alienists. The judgment in favor of Krueger, on March 4, 1914, was entirely unexpected by Mrs. Suter, her attorney, and Tum Suden, the guardian.

The bill shows that it was the fraud, collusion and conspiracy of Mrs. Suter and said Tum Suden, the guardian *ad litem*, that brought about the granting of a new trial to Mrs. Suter; and without a new trial, or new testimony, or the calling of witnesses for further testimony, or to explain testimony given, and by the consent of the guardian *ad litem*, the judgment of July 11, 1914, was rendered in favor of Mrs. Suter, and against Krueger. Thereafter, Tum Suden presented to the Court a petition for compromise of Krueger's claim; and on the representations made to the Court that such was for the best interests of Krueger and the estate of his mother, the Court trusting in and relying upon said Tum Suden and his statements; and the Court not being fully advised of the true facts, an order of compromise was given, whereby the guardian is authorized to compromise and to pay the money into a bank, in Krueger's name, "subject to his order" (Record, p. 93) (but the money has not even yet been paid by Tum Suden to said bank); yet Krueger is *non compos*

mentis, and unable to care for his property, as is claimed by said Tum Suden and the attorney for Mrs. Suter.

In short, the bill sets forth sufficient facts to constitute a valid cause of action, in this: two fraudulent judgments are shown; one, the judgment obtained on the foreclosure of the mortgage, and the second in the ejectment suit. Further, it is shown that the judgment in ejectment was by fraud obtained and is sought to be enforced against Krueger and the Estate of Anna Maria Krueger, to the detriment and loss of said Krueger and said estate; that Krueger has a good and meritorious defence to the ejectment suit and the judgment obtained therein on the merits; that the fraud alleged prevented Krueger from the benefit of his defense; that said judgment was obtained against Krueger from no fault or negligence of his, but, from the fraud, collusion and consent of his guardian *ad litem*, and, that said Krueger has no adequate remedy at law.

The guardian *ad litem* was without authority to make the compromise or to waive errors or rights of appeal, as was in this case done.

Guardian has no power to settle claims:

Isaacs v. Boyd, 5 Port. (Ala.), 388;

Johnson v. McCann, 63 Ill. App., 110;

Edsall v. Vandemark, 39 Barb., 589.

Especially so when action has gone to judgment:

O'Donnell v. Broad, 2 Pa. Dist. Rep., 84;
Fletcher v. Parker, 53 W. Va., 422.

Guardian must make vigorous defense:

Sconce v. Whitney, 12 Ill., 150;
Rhoads v. Rhoads, 43 Ill., 239;
Tyson v. Tyson, 94 Wis., 225.

Authority of Guardian limited:

Waterman v. Lawrence, 19 Cal., 218.

When action is dismissed, authority of the guardian *ad litem* to act for ward terminates:

Rosso v. Sec. Ave. R. R. Co., 13 N. Y. App.,
 375.

Guardian can do nothing to injury of ward. His duty ends when suit ends:

Story Equity Pleading, Section 70;
 2 *Story Equity*, Section 1352;
Hinton v. Bland, 81 Va., 592-3;
Cates v. Picketts, 97 N. C., 26;
Price v. Crone, 44 Miss., 571;
Davis v. Gist, Dud. Equity (S. C.), 1.

Everything must be proven. No admissions to bind ward, by a guardian, affecting his substantial rights:

Hooper v. Hardie, 80 Ala., 114;
Pillow v. Sentelle, 39 Ark., 61;
Evans v. Davis, 39 Ark., 235;
Cochran v. McDowell, 15 Ill., 10.

and this is so in law and in equity:

Atchinson Co. v. Elder, 50 Ill. App., 276;
Collins v. Trotter, 81 Mo., 275.

As it is charged in the bill that the judgment in ejectment was obtained by fraud, Krueger, as the ward of Tum Suden, the guardian *ad litem*, can dispute the said judgment for the fraud and collusion in the making of the judgment, by consent and fraud of the guardian.

1 *Daniels Ch. Pl. & Pr.* (6th Am. Ed.), 163;
Kirby v. Kirby, 142 Ind., 419.

The judgment of July 11, 1914, was a CONSENT judgment, consented to, as a fraud on Krueger, by his guardian *ad litem*, and, such is without authority of the guardian. No judgment by consent can be given against a ward:

1 *Daniels Negotiable Instruments*, 225 Marginal note 220;
Waterman v. Lawrence, 19 Cal., 210;

Fischer v. Fischer, 54 Ill., 231;

Tucker v. Bean, 65 Mo., 352;

Turner v. Jenkins, 79 Ill., 228.

A ward is not bound by any waiver of rights by guardian *ad litem*:

Cartwright v. Wise, 14 Ill., 417;

Lichfield v. Burrell, 5 How. Pr. (N. Y.), 341.

A ward cannot be bound by admissions of his guardian. In this respect, appellee refers to the admissions against the interest of appellee made by his guardian and evidenced at the trial of the ejectment suit, and, in the petition for compromise and the affidavit of Tum Suden, his said guardian (Record, pp. 90, 91, and 95 to 104 inclusive, and, the transcript of the testimony at the trial of the ejectment suit in December, 1914, on file in the District Court).

Bank of N. S. v. Ritchie, 8 Pet. (U. S.), 128;

Turner v. Jenkins, 79 Ill., 228;

Ingersoll v. Ingersoll, 42 Miss., 155;

Johnson v. McCave, 42 Miss., 255;

Mattson v. Dowling, 54 Ala., 202;

Evans v. Davis, 39 Ark., 235;

1 *Daniels Ch. Pl. & Pr.* (6th Am. Ed.), 169;

Ralston v. Lehee, 74 Am. Dec., 291.

Appellants cite Section 372 of the Code of Civil Procedure of California as the authority for Tum Suden in the compromise proceedings; but it is here

claimed and always has been claimed that, if the Court had been fully advised and informed of the true facts, and that the record was incorrect as to the testimony of Temple, and that said Temple did not testify that he, for Krueger, had appealed from the *judgment* of foreclosure, but that he had appealed *from the order, made after judgment, to vacate the said void judgment*; and if said Tum Suden had recalled said Temple, and submitted the testimony alleged to have been given at said trial, the said judge would not have granted said order of compromise; nor would he have granted a motion for a new trial; nor have entered the judgment of July 11, 1914. Hence, as the Court relied upon the statements of said Tum Suden and said attorney for Mrs. Suter, and not being fully or correctly advised, the real facts being suppressed in the face of what seemed error and the law, the judge could not do else than has been done.

In short, if there had been no fraud perpetrated on Krueger by his guardian *ad litem* conspiring with Mrs. Suter, there would have been no judgment in the ejectment suit in favor of Mrs. Suter, and Krueger would not now be appealing to this Court in equity.

Appellants contend, and have cited authorities to support such contention, that as Krueger is the heir of the Estate of his mother, Anna Maria Krueger deceased, and is entitled to possession of the property,

and, has appeared in the ejectment action, that he is bound thereby and that the judgment as rendered in ejectment is good. BUT, on inspection of these authorities, it is clear that said authorities proceed on the acknowledged fact that the judgments or papers therein set forth were valid; while in this case, plaintiff (appellee) contends that the judgment in foreclosure, under which Mrs. Suter, and the estate of her husband claim title to said property and the right of possession, *was set aside as a void judgment for want of jurisdiction in the Court to make the same*; and that any rights obtained under such judgment fell when the same was set aside. Also that the last judgment in ejectment was obtained by fraud, collusion and conspiracy, and is not binding on said Krueger. Further, the said Daniel Suter, deceased, a lawyer, was not an innocent purchaser at the foreclosure sale; nor did he receive a commissioner's deed without knowledge of the fact that the judgment was void; and Mrs. Suter, his wife and executrix, is charged with the same knowledge.

The ejectment action should have been brought against Krueger, as the administrator of the estate of Anna Maria Krueger, deceased, in whom the title of the property is. The possession of Krueger is that of and by virtue of being administrator. His possession as said administrator is lawful, and not obtained by either malfeasance, misfeasance or by tort. He is there under a legal right, representing an interest claiming the title absolute to the property.

IV. THE BILL SHOWS A MERITORIOUS DEFENSE TO THE ACTION IN THE STATE COURT.

The bill shows that Krueger, not as an individual but as the administrator of the Estate of Anna Maria Krueger, deceased, appeals to this Court, in equity, for relief from a judgment obtained in the State Court by fraud. It further shows that Krueger is the son and heir of the said deceased person, and, that he is entitled to inherit the property; that the estate has not been closed, nor distribution made, nor the debts, fees and expenses of administration paid. The bill further shows that the judgment obtained by foreclosure proceedings was void and set aside; and that it is by and by reason of title derived from this void and set aside judgment that Mrs. Suter and the estate of her husband claim the title to and right of possession of the said property. The record of the trial of the ejectment suit shows this as fact; and that said estate of Suter seeks to derain title to said property by reason of a certain deed, issued by a commissioner, under the said foreclosure judgment set aside as void for want of jurisdiction.

A judgment of the State Court foreclosing a mortgage, void for want of jurisdiction, and for that reason set aside, gives no protection to any one acting under it or by reason of it.

Wagner v. Drake, 31 Fed., 854.

V. THE ORDER GRANTING INJUNCTION IS NOT ERRONEOUS, and does not stay proceedings in a State Court.

The order is not in violation of Section 265, Judicial Code (36 Stat. L., 1162), re-enacting Section 720, Revised Statutes.

Iron Mountain Ry. Co. v. City of Memphis,
96 Fed., 131;
French v. Hay, 22 Wall., 250-3;
Dietsch v. Huidekoper, 103 U. S., 494-8;
Fisk v. R. R. Co., 9 Fed. Cases, 167;
Sharon v. Terry, 36 Fed., 337;
Union, etc. v. Univ. Chicago, 6 Fed., 443;
Garner v. Bank, 67 Fed., 443;
High on Injunctions, "Irreparable Injury,"
Preliminary Injunctions, S. S. 7-10;
W. U. T. Co. v. Louisville, 201 Fed., 919;
Equitable T. Co. v. Pollitz, 207 Fed., 74;
Union R. R. Co. v. Ill. Cent. Co., 207 Fed.,
745;
Mo. etc. Co. v. Chappell, 206 Fed., 688.

In *National Surety Co. v. State Bank*, 120 Fed., 597, citing *Marshall v. Holmes*, 141 U. S., 589-596, Justice Sanborn held: "That it is no violation of Section 720, Statutes aforesaid, for Federal courts to enjoin the plaintiff in an unconscionable judgment of a State Court from using it to extort money from a defendant, who ought not, in equity and

“good conscience to pay it; *because such an injunction acts on the person of the judgment plaintiff and not upon the State Courts or its officers.*”

The foundation of equity jurisdiction is the wrong that will be perpetrated if the court of equity does not act.

Other decisions supporting claim that appellee is not seeking injunction in violation of Section 265, Judicial Code, are:

Teft v. Sternberg, 40 Fed., 3;

Corel v. Heyman, 114 U. S., 176;

Buck v. Colbrath, 3 Wall., 341;

Wagner v. Drake, 31 Fed., 851;

Kern v. Huidekoper, 103 U. S., 485.

Notwithstanding, *Hall v. Ames*, 182 Fed., 1008, it has been held that the doctrine there laid down does not prevent the filing of a bill in the Federal Court to set aside (and how much therefore to stay!) proceedings under a judgment or decree of a State Court:

Gaines v. Fuentes, 92 U. S., 10;

Barrow v. Hunton, 99 U. S., 80-83;

Arrowsmith v. Gleason, 129 U. S., 86;

Marshall v. Holmes, 141 U. S., 889;

Robb v. Vos, 155 U. S., 13;

Sahlgard v. Kennedy, 2 Fed., 295;

Simon v. So. R. R. Co. (C. C. A.), 195 Fed., 56;

In re Towar v. Minnesota, etc., 10 Fed., 401.

The doctrine does not apply to case where the Federal Court exercises superior jurisdiction for the purpose of enforcing supremacy of the constitution and the laws of the United States.

Teft v. Sternberg, 40 Fed., 2-6;

Covell v. Heyman, 111 U. S., 176.

Though Eggers, qua Sheriff, be restrained, that does not void the injunction. The real party restrained is Mrs. Suter, her agents, servants, and employees, and Eggers (nominally Sheriff, though Sheriff no longer) has no interest in the action and Mrs. Suter's counsel voluntarily acts for him; and Eggers has not even appeared nor filed any affidavit or motion or pleading herein; and the injunction operates against him, not as a State officer, but as a servant and employee of Mrs. Suter, in her attempt to oust Krueger and obtain the said real property. Eggers, personally, can be dropped and the injunction will remain good as a restraining order preventing Mrs. Suter harassing Krueger until the Court has tried the action on its merits.

Neither deceased's Estate nor Krueger has ever had their day in Court: Suter was not entitled to the amount he claimed as 2nd mortgagee; as could and would have been shown, if there had been a genuine trial, with sworn testimony, before Judge Hebbard—and tho' Suter's money claim was then barred, Krueger did not and does not desire to press that bar, save as

a lever to prevent and diminish the extortion that Suter had practiced on deceased, which his widow seeks to perpetuate.

VI. IT IS NOT NECESSARY THAT BOND BE GIVEN, ON GRANTING INJUNCTION, AND ORDER GRANTING INJUNCTION WITHOUT BOND IS GOOD.

At the time the interim injunction was granted to appellee, a bond of \$1000.00 was given, wherein it is provided that the surety in said bond would pay to the parties wrongfully enjoined or restrained, by reason of the injunction "if the said Court finally decide that plaintiff was not entitled thereto" (Record, p. 23). At the time of the making of the order granting the injunction "*pendente lite*" (which order is now appealed from), the Judge making such order prepared the same and caused the same to be filed.

Section 18, Act of Congress of October 15, 1914 (38 U. S. Statutes at Large, 738), does not apply to injunctions issued in cases of this kind, as is now before the Court. This section of said act of Congress, read with the sections that precede the same, refers to and has to do with anti-trust actions alone.

But, it is submitted, that the appellants are well and fully protected by said bond of \$1000.00 from any damage that they may sustain by the order granting said injunction.

Further, this Court can order, if it so deems necessary to the interests of appellants, a new bond or an amended bond to support said injunction.

VII. Section 19 of the Act of Congress of October 15, 1914, also, does not apply to injunctions issued in cases of this nature as is now before the Court. Said section refers to anti-trust actions only.

VIII. Appellee has hereinbefore set forth the facts which he alleges to be fraud in obtaining the judgment in ejectment in the State Court, and he will not here dwell long upon the same matter. Appellee will only refer to the allegations of his complaint, filed in this suit (Record, pp, 9, 10, 11, 12, 14, 15, 16 and 17).

When a bill discloses a state of facts from which the Court can see that conclusions stated by pleader, to the effect that the judgment was procured by fraud, are properly and fairly drawn, the bill should stand:

Travelers, etc. v. Gilbert, 111 Fed., 271;

U. S. v. Norsch, 42 Fed., 417;

Passaic, etc. v. Ely, etc., 105 Fed., 163.

1. *As to the competency of appellee.* The appellee is of sound mind, fully able to attend to his property and his affairs. Because he asks for what is justly his and because he is a German Swiss, of eccentric ideas and habits, never, by reason of his being an alien, associating with his neighbors, but keeping to himself, those people who have opposed him and wish to obtain the property, easily call him crazy. Krue-

ger's trouble has been, and is now actually so, a great lack of money with which to fight his legal battles and support himself. He is now over sixty-five years of age, and seeks to make a precarious living at his now dead trade of a wood engraver. His manner of answering a question or explaining a fact or transaction is peculiar, but in no way shows the ear-marks of a man out of his mind. When he appeared before the Court, he protested against the claim of Mrs. Suter; and on the claim of Mrs. Suter's attorney, without medical testimony, or outside testimony as to Krueger's fitness and condition of mind, and because Krueger seemed to be a pest, the Court appointed Tom Suden, at Mrs. Suter's attorney's suggestion and request, as the guardian *ad litem*. Thereafter, at the trial of the ejectment suit, said Tum Suden refused to permit Krueger to testify, stating to the Court that Krueger was "*non compos mentis*" and did not know what he was talking about,—yet, when Krueger came to present counsel and stated the facts of his case, said counsel have had no difficulty in ascertaining the truth of those facts. Further, Krueger has always been found prompt in engagements and has a good memory.

In court, with his guardian *ad litem* precluding him from a fair trial, and against him as an incompetent, it is little wonder that the man became excited and beside himself. Krueger did not have anything to say about the compromise of his judgment, and

the giving away of his property by his guardian *ad litem*, and he knew nothing of the same, until informed by his guardian that he, Tum Suden, had \$1500.00, out of which he, Tum Suden, was to keep \$250.00. Immediately Krueger refused this and rejected it and sought another attorney to set aside the judgment and the compromise. Does this appear as if the man was incompetent? Meanwhile Tum Suden enjoys possession of the entire sum of \$1500.00. He has disobeyed the Superior Court's order that he pay \$1250.00 to Krueger's credit, with the German Savings & Loan Society.

2. *As to the alleged fraud of appellants.* Appellee has already presented the same hereinbefore; but he will call the Court's attention to this fact:—that the ejectment action of Mrs. Suter and her claim of title to said property is based solely upon a deed, issued by a Commissioner on a judgment of foreclosure of a mortgage on said property, to Daniel Suter, which said judgment was, by the Court, set aside as *void* for want of jurisdiction. Appellant, Mrs. Suter, has proceeded on the theory that her commissioner's deed was based upon a *valid* judgment; whereas, in fact and truth, such judgment was set aside and is non-existent.

At the trial of the ejectment suit, Warner Temple testified as to the facts of the setting aside of this judgment; and, further, he testified as to all the facts surrounding the setting aside of the judgment, to wit,

that he made a motion to vacate this judgment for want of jurisdiction which motion was denied; and from the order denying his motion to vacate the said judgment he appealed. When the testimony was transcribed, it is thereby made to say that Temple testified that he appealed from the *judgment* of foreclosure; which was not his testimony, nor was it the fact. At the first trial of the ejectment suit, the guardian *ad litem* consulted with said Temple as to his acts concerning the said judgment, and depended for his testimony for such upon said Temple, *and won the case*; yet when Tum Suden's attention was directed thereto by Mrs. Suter's attorney (as he claims), that Temple (by the transcript), testified that he had appealed from the judgment (instead of having appealed from the *order* refusing to vacate the judgment), why did not said guardian, a lawyer, consult with Temple, show him his testimony, and obtain the truth of the same? Temple was present then, and is still alive.

As no appeal was taken from the judgment of foreclosure, there is nothing in the point that an appeal was pending; therefore, the order of Judge Hebbard, made after judgment and setting aside the void judgment for lack of jurisdiction, was within his right to do so. Judge Hebbard, on being shown that he had no jurisdiction to make the foreclosure decree, had the right and power to vacate such decree at any time, *ex propria motu*.

A void judgment is determined by inspection of the judgment roll:

Dell Campo v. Camarillo, 154 Cal., 396.

Motion to vacate a judgment is direct and not a collateral attack:

People v. Mullan, 65 Cal., 396;

People v. Pearson, 76 Cal., 400.

A judgment void for want of jurisdiction, can be vacated on motion, irrespective of lapse of time:

People v. Greene, 74 Cal., 400;

Eliot v. Bastian, 11 Utah, 466;

People v. Povis, 143 Cal., 676 (Approv.

Wiencke v. Bibby, 15 Cal. App., 53);

Winrod v. Wolters, 141 Cal., 403;

Thompson v. Corkle, 43 Am. St. Rep., 348;

1 *Freeman on Judgments* (4th Ed.), S. 93, p. 193-4.

The records and documents of the foreclosure action do not show any appearance by said Farnham, at the time of the trial. Mr. Clough has no clear recollection of what transpired at this trial, or who was present, and it is admitted that no answer was ever filed in the court, nor is there any proof of service of the summons in said action.

It is to be remembered that the ejectment suit was against Krueger *as an individual*; that the present bill is by Krueger, *as the administrator of the Estate of Anna Maria Krueger, deceased*.

It is well established law that the administrator is but an officer of the probate Court, for the purposes of administration of the estate; and that the control of the property of the deceased is in the probate court, subject to its orders and that the heirs of an estate have no title to the said property of the estate until the final distribution of the property thereof to the heirs.

Re Vance, 152 Cal., 760-63;

Code Civil Procedure, California, Secs. 1384-1452-1581;

Robertson v. Burrow, Cal., 568-574;

Maddox v. Russell, 109 Cal., 417.

IX. This suit, before this Court, is maintained by Krueger, as the administrator of the Estate of Anna Maria Krueger, deceased, and not as an individual. In the State Court, Krueger moved as an individual, and was sued therein as an individual. Hence, doctrine of *Res Adjudicata* does not apply.

It is respectfully submitted that the order and interlocutory decree should be affirmed, and the bill

sustained, and the appellants ordered to try the issues on the merits.

Dated: San Francisco, March 20, 1916.

WARNER TEMPLE,
Solicitor for Appellee.

M. H. FARRAR,
Of Counsel.

No. 2681

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FREDERICK EGGERS, as Sheriff of the City
and County of San Francisco, California,
SOPHIE SUTER, SOPHIE SUTER, as Executrix
of the Will of Daniel Suter, Deceased, and
OTTO TUM SUDEN,

Appellants,

vs.

AUGUST FERDINAND KRUEGER (otherwise
Kruger), Administrator of the Estate of
Anna Maria Krueger (otherwise Kruger),
Deceased,

Appellee.

APPELLANTS' REPLY TO APPELLEE'S PETITION FOR A REHEARING.

Filed

NOV 14 1916

EDWARD C. HARRISON,

MAURICE E. HARRISON, *D. Monckton*

Solicitors for Appellants.

Filed this.....*day of November, 1916.*

FRANK D. MONCKTON, Clerk.

By.....*Deputy Clerk.*

No. 2681

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FREDERICK EGGERS, as Sheriff of the City
and County of San Francisco, California,
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OTTO TUM SUDEN,

Appellants,

vs.

AUGUST FERDINAND KRUEGER (otherwise
Kruger), Administrator of the Estate of
Anna Maria Krueger (otherwise Kruger),
Deceased,

Appellee.

APPELLANTS' REPLY TO APPELLEE'S PETITION FOR A REHEARING.

The appellants in the above entitled cause respectfully submit for consideration a few words only, in answer to the petition for rehearing presented herein on behalf of the appellee.

If anything can be found in the petition for rehearing that merits consideration for a moment, it

is the suggestion therein contained to the effect that the court has, in its decision of the appeal, overlooked the fact, now claimed to exist, that no appeal was taken from the decree of foreclosure.

The petition says, on its page six, that "the Honorable Judge's summary regarding what took place is absolutely wrong," because on page five of the decision it is set forth as a fact that Krueger consulted his attorney, etc., about appealing. And it is further stated on the same page of the petition that "the learned Judge has been led into this error by wilful misstatement, &c."

But the opinion does not set forth as a fact that Krueger consulted his attorney; the language of the opinion is:

"Defendant in that suit (Krueger) then called the attorney who had looked after Krueger's interests in the foreclosure suit, and he testified that after decree of foreclosure had been rendered in the foreclosure suit, Krueger consulted him about appealing; that this was about five or six weeks before expiration of the time to take an appeal expired; that on May 20, 1904, he obtained an order, etc."

On pages 80, 81, 84 and 85 of the record will be found the sworn testimony of Warner Temple, the writer of the petition for rehearing, which testimony is precisely as stated in the language of the decision, and precisely also as stated in the affidavit of Edward C. Harrison, the writer of this answer, so viciously attacked in the petition for rehearing. Neither the writer hereof nor the learned writer

of the opinion can say whether Warner Temple testified truly under oath on the trial of the ejectment case, the judgment of which is attacked in this cause, or in this case, when his recollection is not so fresh; but there can be no question that he did testify in the ejectment cases, and in the manner recited in the decision. The record so shows, and counsel does not pretend to contradict the record in this respect. All that it is necessary to know, and all that is known concerning this testimony is that when the judgment under attack was rendered and entered under the compromise made on the facts as they stood at the time, all that the court and the parties had before them was the aforesaid sworn testimony of Warner Temple, which he had not yet then contradicted under oath and which was then properly presumed to be true. It can hardly be made the basis of counsel's attack upon the testimony for appellants in this case, or the decision rendered on this appeal, that the former truly states, and the latter truly recites, his own sworn testimony as the record shows it, notwithstanding his present tardy contradiction of the facts shown by such former testimony.

There is nothing else in the petition for rehearing that seems to appellants' counsel to require attention, and with apologies for troubling the court with even this short answer, it is respectfully submitted on their behalf that the decision rendered is pre-eminently just, and the only possible one in the

case, and that the petition for rehearing should be denied.

Dated, San Francisco,
November 11, 1916.

Respectfully submitted,

EDWARD C. HARRISON,

MAURICE E. HARRISON,

Solicitors for Appellants.

United States
Circuit Court of Appeals
For the Ninth Circuit.

H. C. AMES,

Plaintiff in Error,

vs.

JERRY SULLIVAN,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Alaska, Second Division.

Filed

FEB 4 - 1911

F. D. McCallan,

United States
Circuit Court of Appeals
For the Ninth Circuit.

H. C. AMES,

Plaintiff in Error,

vs.

JERRY SULLIVAN,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Alaska, Second Division.

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[Names and Addresses of] Attorneys of Record.

T. M. REED, Nome, Alaska.

O. D. COCHRAN, Nome, Alaska.

Attorneys for Plaintiff.

G. J. LOMEN, Nome, Alaska.

GEORGE B. GRIGSBY, Nome, Alaska.

IRA D. ORTON, Nome Alaska.

Attorneys for Defendant. [1*]

*In the District Court for the District of Alaska,
Second Division.*

N. O. WINQUIST,

Plaintiff.

vs.

H. C. AMES,

Defendant.

Complaint.

Plaintiff complains of defendant and for cause of action alleges:

1st. That plaintiff at all times herein stated was and now is the owner in fee (subject only to the paramount title to the United States), and entitled to the possession of that certain mining claim known and described as No. Thirty-two (32) Above Allen's Discovery, on the Kougarok River, in the Kougarok Mining and Recording Precinct, in the District of Alaska, particularly descibed as follows:

Commencing at the initial stake, being the lower center end stake, thence in a northerly direction as

*Page-number appearing at foot of page of original certified Record.

near as practicable at right angles to the general course of the stream 330 feet to corner stake No. 1; thence at right angles in a westerly direction upstream as near as practicable to the general course thereof 1320 feet to corner stake No. 2; thence in a southerly direction at right angles 330 feet to the upper center end stake; thence continuing on the same line 330 feet to center stake No. 3; thence at right angles in *a* easterly direction down-stream as near as practicable to the general course thereof 1320 feet to corner stake No. 4, thence [1a] at right angles 330 feet to the place of beginning. Said mining claim adjoining No. 31 Above Allen's Discovery on the Kougarok River, and the notice of location of which said claim is recorded in Vol. 32, 170, of the Records of the Kougarok Recording Precinct, District of Alaska.

2d. That on the — day of February, 1912, the defendant wrongfully and unlawfully entered in, and upon, said premises and ousted and ejected plaintiff therefrom, and ever since, and now, wrongfully withholds the possession thereof from plaintiff to his damage, in the sum of Five Thousand (\$5,000) Dollars.

WHEREFORE, plaintiff prays judgment that he be entitled to the possession of said property, and that defendant be not entitled to the possession thereof, or any portion thereof.

2d. That plaintiff have judgment in the sum of Five Thousand (\$5,000) Dollars, damages and for his costs and disbursements herein.

T. M. REED,
Atty. for Plaintiff. [2]

United States of America,
District of Alaska,—ss.

N. O. Winquist being first duly sworn, deposes and says: That he is the plaintiff named in the foregoing complaint, has read over the said complaint, knows the contents thereof and believes the same to be true.

N. O. WINQUIST.

Subscribed and sworn to before me this 27th day of April, 1912.

[Notarial Seal]

T. M. REED,

Notary Public for the District of Alaska.

[Endorsed]: #2372. No. ——. In the District Court for the District of Alaska, Second Division. N. O. Winquist, Plaintiff, vs. H. C. Ames, Defendant. Complaint. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Apr. 29, 1912. John Sundback, Clerk. By ———, Deputy. T. M. Reed, Attorney for Plaintiff. [3]

*In the District Court for the District of Alaska,
Second Division.*

No. —.

N. O. WINQUIST,

Plaintiff,

vs.

H. C. AMES,

Defendant.

Answer.

Now comes the defendant above named, and for answer to the complaint of the plaintiff herein, denies and alleges as follows:

I.

The defendant denies each and every allegation, matter and thing in the complaint alleged, and specifically denies that plaintiff has been damaged in the sum of \$5,000 or in any sum whatsoever.

For a further and affirmative defense herein, the defendant alleges:

I.

That he is the owner of, subject to the paramount title of the United States, in the possession of and entitled to the possession of that certain placer mining claim lying and being in the Kougarok Recording District, District of Alaska, and known as the Kshunti Fraction placer mining claim, described by metes and bounds as follows:

Commencing at the initial stake which is about 150 [4] yards in a westerly direction from the Kougarok River and about two miles below the mouth of Macklin Creek; running thence 660 feet in an easterly direction to stake No. 1; thence 1200 feet in a northerly direction to stake No. 2; thence 660 feet in a westerly direction to stake No. 3; thence 1200 feet in a southerly direction to the initial stake and place of beginning.

II.

That said placer mining claim was located on or about the 25th day of July, 1903, by one G. J. Mc-

Lean, by then and there marking said claim by good and substantial stakes and monuments so that its boundaries could be readily traced; making a discovery of gold thereon, and recording a notice of location thereof.

III.

That thereafter, the said locator G. J. McLean, sold and conveyed by deed in writing, the undivided one-half ($1\frac{1}{2}$) of said claim to the defendant herein, by virtue of which location and title deed, the defendant claims and owns said premises.

IV.

And if the said placer mining claim mentioned and described in the plaintiff's complaint in any manner, in whole or in part, overlaps the said Kshunti Fraction, such overlap and title thereto is junior in time and inferior in right, to the title of said defendant; and that plaintiff has no right, title or interest in and to said overlap or any part thereof.

V.

Except as hereinbefore stated, the defendant disclaims any right, title or interest in or to the premises [5] described in the complaint, and denies that he is, or has been, in possession thereof.

For a second affirmative defense, the defendant realleges and reiterates and makes a part of this defense the allegations contained in the first affirmative defense herein and alleges further:

That ever since the 25th day of July, 1903, the defendant and his co-owner and predecessors in interest, G. J. McLean, have been and are now in the actual, uninterrupted, open, adverse, notorious and

exclusive possession of the Kshunti Fraction described in said first defense herein, and of the whole thereof, and that said claim and premises were, during all of said times, well and plainly marked and defined by good, substantial, visible and permanent stakes and monuments, and so marked that the boundaries of said Kshunti Fraction could be readily traced.

WHEREFORE the defendant prays that said plaintiff take nothing by his said action, and that the defendant have judgment that the title to said Kshunti Fraction and the whole thereof, including any overlap, if any, under any location claimed by the plaintiff whatever, whether said claim be known as No. 32 Above Allen's Discovery or otherwise, and that defendant be adjudged to be entitled to the possession thereof, and that plaintiff has no right, title, estate or interest therein or any right of possession thereto, and for his costs and disbursements herein.

G. J. LOMEN,

Attorney for Defendant. [6]

United States of America,
District of Alaska,—ss.

H. C. Ames, being first duly sworn, deposes and says: That he is the defendant named in the foregoing answer; that he has read the same, knows the contents thereof, and that the same are true as he verily believes.

H. C. AMES.

Subscribed and sworn to before me this the 15th day of May, 1912.

[Notarial Seal]

G. J. LOMEN,

Notary Public in and for the District of Alaska.

Service by copy of the within answer is hereby admitted at Nome, Alaska, this 15th day of May, 1912.

T. M. REED,

Atty. for Plff.

[Endorsed]: 2372. In the District Court for the District of Alaska, Second Division. N. O. Winquist, Plaintiff, vs. H. C. Ames, Defendant. Answer. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. May 15, 1912. John Sundback, Clerk. By ———, Deputy. G. J. Lomen, Attorney for Defendant.
[7]

*In the District Court for the District of Alaska,
Second Division.*

No. —.

N. O. WINQUIST,

Plaintiff,

vs.

H. C. AMES,

Defendant.

Reply.

Now comes the plaintiff above named, and for reply to the defendant herein, says:

That he denies each and every allegation contained in the first and second affirmative defenses in

the answer of the defendant, and the whole and each thereof.

WHEREFORE plaintiff prays judgment as in his complaint set forth.

T. M. REED,
Attorney for Plaintiff. [8]

United States of America,
District of Alaska,—ss.

I, N. O. Winquist, being first duly sworn, depose and say that I am the plaintiff in the above-entitled action and that I believe the foregoing — is true.

N. O. WINQUIST.

Subscribed and sworn to before me this 17th day of August, 1912.

[Notarial Seal]

T. M. REED,
Notary Public for the District of Alaska.

[Endorsed]: No. 2372. In the District Court for the District of Alaska, Second Division. N. O. Winquist, Plaintiff, vs. H. C. Ames, Defendant. Reply. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Mar. 18, 1913. John Sundback, Clerk. By _____, Deputy. T. M. Reed, Attorney for Plaintiff. [9]

*In the District Court for the District of Alaska,
Second Division.*

N. O. WINQUIST,

Plaintiff,

vs.

H. C. AMES,

Defendant.

Instructions to the Jury.

Gentlemen of the Jury:

This is an action brought by the plaintiff, N. O. Winquist against the defendant, H. C. Ames, for the recovery of the possession of a certain placer mining claim described in the complaint as No. Thirty-two (32) Above Allen's Discovery on Kougarok River, in the Kougarok Recording Precinct, District of Alaska; and describing it by metes and bounds, and alleging that the plaintiff is the owner by virtue of a location made in January, 1902.

Plaintiff further alleges that in February, 1912, the defendant wrongfully and unlawfully entered in, and upon, said premises and ousted and ejected plaintiff therefrom; and ever since and now wrongfully withholds the possession thereof from plaintiff, to his damage in the sum of Five Thousand (\$5,000) Dollars; and prays for judgment for the possession and for damages.

To the foregoing complaint, the defendant has filed an answer in which he denies each and every allegation of the complaint, and sets up by way of an affirmative defense: [10]

1. That he is the owner and in the possession and entitled to the possession of, a certain placer mining claim known as the Kshunti Fraction, situated in the Kougarok Recording District; and describing said fraction by metes and bounds alleges that said claim was located on the 25th day of July, 1903, by one G. J. McLean, by marking the boundaries thereof by substantial stakes and monuments, so that its

boundaries could be readily traced; making discovery of gold thereon, and recording a notice of location thereof.

2. That the said G. J. McLean sold and conveyed by deed in writing an undivided one-half ($\frac{1}{2}$) of said claim to defendant, and that the defendant is owner of said premises.

3. Defendant further alleges that if plaintiff's mining claim, as described in the complaint, overlaps the said Kshunti Fraction in whole or in part, such overlap is junior in time and inferior in right to the title of defendant; and that plaintiff has no right, title or interest in, or to, said overlap, or any part thereof.

4. Defendant disclaims any right, title or interest in, or to, the premises described in the complaint, except as to *that* portion as may be found to overlap the Kshunti Fraction.

As a second defense, defendant alleges that ever since the 25th day of July, 1903, the defendant and his co-owner and predecessor in interest, G. J. McLean have been and now are in the actual, uninterrupted, open, adverse, notorious, and exclusive possession of the Kshunti Fraction as described in defendant's answer. That said claim was during all said time well and plainly marked and defined by good, substantial, visible and permanent stakes and monuments, so that the boundaries could be readily traced. [11]

To the affirmative defense as pleaded by the defendant, plaintiff has filed a reply denying each and every allegation contained in the first and second

defenses. For a more particular description of the allegations contained in the pleadings, you may consult the pleadings which you will take with you to the jury-room.

In a civil case like this, the affirmative of an issue must be proved by the party alleging it, by a preponderance of the evidence. The burden of proof is upon the plaintiff to prove all the essential acts for the perfection of his location, as alleged in the complaint; and the burden is upon the defendant to prove all the steps necessary for the making of a valid location of the Kshunti Fraction, as alleged in the first affirmative answer, also the facts alleged by him in the second affirmative defense contained in the answer.

The plaintiff must recover upon the strength of his own title and not upon the weakness of defendant's title. If you should find, from a perponderance of the evidence, that the plaintiff did not perform all the acts necessary to be performed in the making of a valid location of a placer mining claim, or, if it should appear that at the time plaintiff attempted to make a location of the claim known as No. Thirty-two (32), it had been previously properly located in the name of another, and had not been abandoned nor forfeited, then your verdict should be for the defendant, irrespective of the question as to whether he had a valid location of the Kshunti Fraction.

The requisites of the valid location of a placer mining [12] claim are:

1. The premises sought to be located must be

open, unappropriated public domain of the United States.

2. There must be a discovery of gold made within the exterior boundaries of the claim.

3. The exterior boundaries of the claim must be so marked by natural objects or permanent monuments that the boundaries can be readily traced.

In a case of this character, the Judge and jury of this court have separate functions to perform. It is your duty to hear all the evidence, all of which is addressed to you, and to decide thereupon all questions of fact. It is the duty of the Judge of this court, upon the other hand, to instruct you upon the law applicable to the facts and evidence in this case, and the statute makes it your duty to accept as law what is laid down as such by the Court.

You are instructed that you, as jurors, are the sole judges of the credibility of witnesses and the weight to be attached to their testimony. Your power, however is not arbitrary, but is to be exercised with discretion and in subordination to the rules of evidence. You may take into consideration the interest the witness has, if any, in the result of the trial; his bias or prejudice, if any, for or against the parties; his mental capacity for knowledge and his means of knowing that about which he testifies; the reasonableness or unreasonableness of his statements; his demeanor on the witness stand; his candor or evasion, if either appear; and applying your knowledge and observation of human actions, motives and affairs, you will find the truth and present the same in your verdict. [13]

The law also makes it my duty to instruct you that you are not bound to find in conformity to the testimony of any number of witnesses which do not produce conviction in your minds, against a less number, or against a presumption or other evidence satisfying your minds.

You are also instructed that a witness who is wilfully false in one part of his testimony may be distrusted by you in other parts. If you find that any witness in this case has testified falsely in one part of his testimony, you are at liberty to reject all or any part of his testimony, but you are not bound to do so; you may reject the false part and give such weight to other parts as you may think they are entitled to receive.

You are instructed that if the testimony of a witness appears to be fair, and not unreasonable, and is consistent with itself, and the witness has not been in any manner impeached, then you have no right to disregard the testimony of such witness from mere caprice and without cause. It is your duty to consider the whole of the evidence and to render a verdict in accordance with the weight of all the evidence in the case.

You are instructed that the affirmative of the issue shall be proved by the party alleging it; and, when the evidence is contradictory, your finding should be in accordance with the preponderance of the evidence. In determining upon which side the preponderance of the evidence is, you should bear in mind the rules given in these instructions for the weighing of testimony.

You are instructed that, under the laws of the district of Alaska relative to the appropriation of mining claims, it [14] is not necessary to record a notice of location in order to perfect a claim. If title to a claim has been initiated by a discovery of gold and marking of the boundaries by stakes and monuments and written notice posted on the claim, such title cannot be defeated by changing the name in the recorded notice, nor by taking down the notice which had been posted upon the claim and placing thereon a notice containing the name of another.

The main question for you to pass upon in this case is which of the parties to this litigation has the better right to the ground in controversy, under the testimony as produced in the trial and the law as given you by the Court.

I hand you herewith two forms of verdict drawn in conformity with the law. When you have retired to your jury-room, and have agreed upon your verdict, each one for himself, you should have your foreman, to be selected by yourselves, sign the one upon which you unanimously agree and return it into court as your verdict in this case.

You may take with you into the jury-room for your guidance the exhibits and the pleadings in the case.

Let the bailiffs be sworn. You may now retire, gentlemen, to deliberate upon your verdict.

J. R. TUCKER,
District Judge.

Nome, Alaska, October 15, 1914. [15]

[Endorsed]: No. 2372. In the District Court for the District of Alaska, Second Division. N. O. Win-

quist, Plaintiff, vs. H. C. Ames, Defendant. Instructions to the Jury. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 16, 1914. G. A. Adams, Clerk. By W. C. McG., Deputy. [16]

*In the District Court for the District of Alaska,
Second Division.*

JERRY SULLIVAN,

Plaintiff,

vs.

H. C. AMES,

Defendant.

Verdict.

We, the jury, in the *above-entitled find* for the plaintiff and that the plaintiff is entitled to the possession of the mining claim known and described as No. 32 Above Allen's Discovery, on Kougarok River, in the Kougarok Recording Precinct, Alaska, and the whole thereof as described in plaintiff's complaint, and defendant is not entitled to the possession of any part thereof, and we assess plaintiff's recovery at One Dollar.

Dated this —— day of October, 1914.

C. E. DARLING,

Foreman.

16th October, 1914.

[Endorsed]: #2372. Jerry Sullivan, Plaintiff vs. H. C. Ames, Defendant. Verdict. Filed in the Office of the Clerk of the District Court of Alaska, Sec-

ond Division, at Nome. Oct. 16, 1914. G. A. Adams,
Clerk. By W. C. McG., Deputy. [17]

*In the District Court for the District of Alaska,
Second Division.*

N. O. WINDQUIST, Now by Substitution JERRY
SULLIVAN,

Plaintiff,

vs.

H. C. AMES,

Defendant.

Motion for New Trial.

Comes now the defendant in the above-entitled action and moves the Court that the verdict heretofore rendered in said action be set aside and a new trial of said action granted on the following grounds:

I.

Newly discovered evidence material to said defendant which he could not with reasonable diligence discover and produce at the trial as appears from the affidavit of G. J. Lomen, hereunto annexed and made a part hereof.

II.

Insufficiency of the evidence to justify the verdict and that said verdict is against law in this, to wit:

That there was no sufficient evidence produced at the trial to establish plaintiff's alleged location of No. 32 Above Allen's Discovery, on the Kougarok River, as alleged in plaintiff's complaint, and for the reason that there was no evidence whatever offered

at the trial to establish such location for the reason that said action was an action in ejectment and that plaintiff sought to recover the premises in controversy by a mining location thereof alleged in plaintiff's complaint to have been made on January 10th, 1902, and no [18] sufficient evidence, nor any evidence whatever, was produced upon said trial to establish such location.

III.

Errors in law occurring at the trial and excepted to by the defendant, to wit:

(a) That the Court erred in refusing to grant defendant's motion for a directed verdict made at the conclusion of the trial and before the jury had retired.

(b) That the Court erred in refusing to give the following instruction requested by the defendant:

“You are hereby instructed to find a verdict in favor of the defendant.”

(c) That the Court erred in refusing to give the following instruction requested by defendant:

“If you find from the evidence that one N. Meathe, on or about the 10th day of January, 1902, took any steps towards locating, or did any act tending to locate the premises described in the complaint, or any part thereof, then I charge you that such step or steps, act or acts, if any, done by said N. Meathe, as the agent of any other person than the plaintiff, N. O. Windquist, or in the name of another than the said plaintiff Windquist, did not inure to the benefit of the plaintiff Windquist and did not constitute any act of location on the part of said plaintiff Wind-

quist; and I further charge you that then and in that case neither said plaintiff Windquist, nor any other person acting for or on behalf of said Windquist could appropriate said acts of said Meathe, or any of them, as an act of location in the name of or for the benefit of said Windquist. And I further charge you that if said Windquist performed any act or acts in order to perfect, or necessary to perfect the location of the premises located, [19] or attempted to be located by said Meathe, with the intention of perfecting the location made, or attempted to be made by said Meathe, then such act or acts on the part of said Windquist would not operate as or constitute an original location by Windquist or inure in any manner to the benefit of said Windquist unless you find that said Meathe, in the matter of locating or attempting to locate said premises, acted as the agent of Windquist and not as the agent of another.”

(d) That the Court erred in refusing to give the following instruction requested by defendant:

“I further charge you that in Alaska it is not necessary to record any notice of location, and that when a location is made for an absent locator, whether with or without his authority, or with or without his knowledge, whatever rights are given to him by such location, vests in him at once, and even the person locating such absentee cannot take down the name of such absentee and insert the name of another whether in the notice posted on the ground, if any, or in the certificate of location prepared for record, if any.”

(e) That the Court erred in refusing to give the following instruction requested by defendant:

“I further charge you that plaintiff, in order to recover in this action, must prove the title alleged in the complaint, to wit: Title under a location made on or about the 10th day of January, 1902, notice of which location was recorded in volume 32, at page 170 of the records of the Kougarok Recording District, District of Alaska.”

GEO. B. GRIGSBY,

G. J. LOMEN,

Attorneys for Defendant. [20]

*In the District Court for the District of Alaska,
Second Division.*

N. O. WINDQUIST, Now by Substitution JERRY
SULLIVAN,

Plaintiff,

vs.

H. C. AMES,

Defendant.

**Affidavit of G. J. Lomen [on Motion for a New
Trial].**

United States of America,
Territory of Alaska,—ss.

G. J. Lomen, being duly sworn on oath deposes and says:

That he is one of the attorneys for the defendant in the above-entitled action; that said action came on for trial on the 14th day of October, 1914; that be-

fore the trial commenced the attorney for plaintiff N. O. Windquist moved that one Jerry Sullivan be substituted as plaintiff in said action on the ground as therein stated by counsel for plaintiff that said Jerry Sullivan had succeeded to the interest of N. O. Windquist in the premises described in the complaint and was then and there the real party in interest; that affiant did not then know nor did defendant or his counsel know that said Jerry Sullivan had theretofore and affiant alleges the fact to be that said Sullivan on or about the 5th day of November, 1913, by deed in writing on the date last aforesaid and recorded in volume 81, page 95 of the records of the Kougarak Recording District of Alaska, conveyed the interest acquired from said N. O. Windquist to one Con Kelly; that the above facts became known to affiant after the verdict rendered in the above-entitled action and could not with reasonable diligence, have been ascertained before the trial of said action, the counsel for defendant relying upon the statement made by counsel for plaintiff [21] moving for the substitution of plaintiff.

That by reason of the facts above set forth, affiant states that said action was not prosecuted in the name of the real party in interest, but in the name of said Jerry Sullivan who appears by the transfer to said Con Kelly to have parted with his interest in the premises in litigation herein.

G. J. LOMEN.

Subscribed and sworn to before me this 19th day of October, 1914.

[Notarial Seal]

D. B. CHACE,
Notary Public in and for the Territory of Alaska,
Residing at Nome. Alaska.

(My commission expires May 12, 1917.)

Service admitted of the within motion Oct. 19th, 1914.

O. D. COCHRAN,
Of Atty's. for Plaintiff.

[Endorsed]: #2372. In the District Court for the District of Alaska, Second Div. N. O. Windquist, now by Substitution Jerry Sullivan, Plaintiff, vs H. C. Ames, Defendant. Motion for New Trial. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 19, 1914. G. A. Adams, Clerk. By _____, Deputy. [22]

[Order Denying Motion for a New Trial.]

*In the District Court for the District of Alaska,
Second Division.*

Term Minutes, Special 1914, term, Beginning September 15, 1914.

Saturday, January 2, 1915, at 11 A. M.

Court convened pursuant to adjournment.

Hon. J. R. TUCKER, District Judge, presiding.

Upon the convening of court, the following proceedings were had:

2372.

JERRY SULLIVAN,

vs.

H. C. AMES,

Motion for new trial, heretofore offered, argued by Messrs. Grigsby and Lomen in favor, and by O. D. Cochran and T. M. Reed, against. Matter submitted to the Court and motion denied. Exception taken and allowed to the defendant. [23]

*In the District Court for the District of Alaska,
Second Division.*

No. 2372.

JERRY SULLIVAN,

Plaintiff,

vs.

H. C. AMES,

Defendant.

Judgment.

This cause having come on for trial on the 16th day of October, 1914, Messrs O. D. Cochran and T. M. Reed appearing for the plaintiff and Messrs. G. J. Lomen and Geo. B. Grigsby appearing for the defendant, and both parties announcing themselves ready for trial, and a jury having been empaneled and evidence having been submitted on behalf of plaintiff and defendant, and after argument of counsel the cause having been submitted to the jury, and the jury having retired and considered their verdict upon the evidence submitted and thereupon having returned into court the following verdict: "We, the jury in the above-entitled action, find for the plaintiff, and that the plaintiff is entitled to the possession of the mining claim known and described as No. 32 Above Allen's Discovery, on the Kougarok River,

in the Kougarok Recording Precinct, Alaska, and the whole thereof as described in plaintiff's complaint, and the defendant is not entitled to the possession of any portion thereof, and we assess plaintiff's recovery at one dollar," which verdict was duly filed on said 16th day of October, in this cause in said court. [24]

And the defendant having within the time allowed by law filed a motion for new trial of this action, which said motion for new trial was on the 2d day of January, 1915, argued before the Court and submitted and overruled.

NOW THEREFORE, on motion of Messrs. O. D. Cochran and T. M. Reed, attorneys for plaintiff,

IT IS ORDERED AND ADJUDGED that plaintiff do have and recover from the defendant the possession of placer mining claim described as No. 32 Above Allen's Discovery, on the Kougarok River, in the Kougarok Recording Precinct, Territory of Alaska, and the whole thereof as described in plaintiff's complaint.

And, IT IS FURTHER ORDERED AND ADJUDGED that plaintiff do have and recover from defendant damages in the sum of one dollar, for the unlawful withholding of the possession of said property from the plaintiff, together with his costs and disbursements in this action, taxed at 205.60 dollars.

Done in open court this 9th day of January, 1915.

J. R. TUCKER,

District Judge.

[Endorsed]: No. 2372. In the District Court for the District of Alaska, Second Division. Jerry

Sullivan, Plaintiff, vs. H. C. Ames, Defendant. Judgment. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jan. 9, 1915. G. A. Adams, Clerk. By W. C. McG. Deputy. T. M. Reed, Attorney at Law, Nome, Alaska, Attorney for Plaintiff. Orders & Judgments, Vol. 11, p. 63. C. [25]

**[Order Carrying Filing of Bills of Exceptions Over
Until Next Term.]**

*In the District Court for the District of Alaska,
Second Division.*

Term Minutes, General, 1915, Term, Beginning
January 11, 1915.

Saturday, July 3, 1915, at 10 A. M.

Court Convened Pursuant to Adjournment,

Honorable J. R. TUCKER, District Judge, Presiding.

Upon the convening of Court the following proceedings were had:

On motion of O. D. Cochran, member of bar, the preparation and filing of all bills of exceptions were carried over until next term of court. [26]

*In the District Court for the District of Alaska,
Second Division.*

N. O. WINDQUIST, now by Substitution JERRY
SULLIVAN,

Plaintiff,

vs.

H. C. AMES,

Defendant,

Proposed Bill of Exceptions.

This cause came duly on for trial at a term of the above-entitled court held in and for the Second Division, in Nome, Alaska, on the 14th day of October, 1914, before the Honorable J. R. Tucker, Judge, and a jury, and thereupon the following proceedings were had:

Upon motion of T. M. Reed, of *attorney* for plaintiff, the name of Jerry Sullivan was substituted for that of N. O. Windquist as plaintiff, counsel stating that the said Jerry Sullivan had succeeded to all the right, title and interest of the said N. O. Windquist in the premises in controversy.

Thereupon the following proceedings were had and the following testimony introduced:

[Testimony of George J. McLean, for Plaintiff.]

GEORGE J. McLEAN called as a witness for plaintiff, being duly sworn testified as follows:

My name is George J. McLean; I have lived in the Kougarok since 1902; have followed the occupation of mining and surveying; have had twenty-five years' experience in surveying. In June, 1912, I

(Testimony of George J. McLean.)

made a survey of the mining claim known as No. 32 Above Allen's Discovery and afterwards made a plat or map of that survey. (Witness is shown map.) Yes, that is the map and correctly represents the survey made by me. There were five stakes and monuments, one marked No. 3 [27*—1†] Bull Head Fraction, one marked No. 4 Bull Head Fraction; I don't know what the Bull Head Fraction was. The stakes were there and I put them down. I believe the Kshunti Fraction was staked for me by Mr. Ames. I first learned of the Kshunti Fraction when Mr. Ames, the defendant in this action, asked me for a half interest in the claim. I did not know where it was except that it was on the Kougarok River. After I heard that the Kshunti Fraction had been located I had a conversation with Mr. Ames with reference to it.

Q. What did you tell him?

Mr. LOMEN.—Objected to as immaterial.

The COURT.—Overrule the objection.

To which ruling the defendant then and there excepted and exception allowed.

A. I told him, I said "You had better cut this Fraction business out." I said "I will have nothing to do with a claim that is jumped."

Mr. LOMEN.—Move that the answer be stricken out.

The COURT.—Overrule the motion.

To which ruling the defendant then and there ex-

*Page-number appearing at foot of page of original certified Record.

†Original page-number appearing at foot of page of Proposed Bill of Exceptions of original certified Transcript of Record.

(Testimony of George J. McLean.)

cepted and an exception allowed.

On cross-examination the witness continued as follows:

I don't know whether at the time I made the survey I found any stakes of the Kshunti Fraction or not; all the stakes I found there are marked on the map. I don't see any. There were five stakes there. I never saw any stakes marking the Kshunti Fraction. I made this map under the direction of Gus Johnson. He pointed out the stakes to me. I never knew them before that time. At the time I made the survey I don't remember seeing any stakes marking No. 32. I simply took Gus Johnson's word about the corners. Mr. Windquist sent Johnson up there with me to show me where the corners were and I made the map [28—2] according to the stakes he pointed out to me. I had a surveyor's instrument. The map is according to scale.

On redirect examination witness continued:

Gus Johnson was with me when I made the survey. Mr. Ames was also there but did not point out the stakes of the Kshunti Fraction. I was requested several years ago by Mr. Windquist to make a survey of this ground.

Q. What was the survey to be made for?

Mr. GRIGSBY.—Objected to as immaterial and self-serving.

The COURT.—Objection overruled.

To which ruling defendant then and there excepted and an exception allowed.

A. I was instructed to survey No. 32 by Mr. Wind-

(Testimony of George J. McLean.)

quist; he told me that his claim had been jumped.

(Witness excused.)

THEREUPON the map referred to in the foregoing testimony was offered in evidence for the purpose of illustration.

[Testimony of Gus Johnson, for Plaintiff.]

Thereupon GUS JOHNSON, a witness called for the plaintiff, testified as follows:

My Name is Gus Johnson. I was with George J. McLean when he made a survey of the Kshunti Fraction and No. 32 Above Allen's Discovery. I knew where the boundaries of No. 32 were; there were stakes at the corners of No. 32; there were stakes at the lower line; I knew those stakes and knew them to be stakes marking the boundaries of No. 32. I pointed them out to Mr. McLean at the time the survey was made.

On cross-examination witness testified as follows:

I first saw claim No. 32 Above Allen's Discovery in 1902, in the first part of July. I got my knowledge in regard to the stakes [29—3] of No. 32 from one Methe and Kennedy. Captain Kennedy fixed up the stakes in the spring of 1902; he told me so; that is all I know about it. The stakes I surveyed in 1912, I put there myself. I put up the stakes in 1904. There were no stakes there then at all. All I know about the original staking is what Captain Kennedy told me. They were willow stakes, 1½ to 2 inches thick, five stakes in all. There was a notice on one of them written in with a pencil. The name of N. O. Windquist was on it, I

(Testimony of Gus Johnson.)

don't know who wrote it nor who put it there. It said "N. O. Windquist, Agent," on it. The willow stakes were just stuck in the ground. Don't know whether there were any mounds or not. They were blazed. I examined the markings on the stakes. They were marked initial stake northeast corner, northwest corner, southeast corner and southwest corner. I was there prospecting in 1902. I never saw Captain Kennedy on the claim that year. No one had been on the claim to point out any of the stakes to me between January, 1902, and the time I fixed up the stakes in 1904. I never saw Mr. Windquist on the ground. I have seen Methe on the ground several times. I saw him in 1907. I did not stop to examine any of the stakes at that time. Methe and I never examined the stakes. I was on the claim in 1902, for the purpose of seeing that the stakes were up. Mr. Windquist's stakes I am referring to. Went up there to see them. I knew the claim was there. I had permission to prospect on No. 32 from Mr. Windquist. I first went to the initial stake and from there to the corners."

Q. Up to what corner?

A. I don't remember which one, to the southeast corner, I believe.

Q. Which side of the river were you on?

Mr. COCHRAN.—Object to all this cross-examination. I have only put him on here for one purpose, and I don't care to go into all his testimony at this [29½—4] time. I merely wanted to show he knew where the boundaries were.

(Testimony of Gus Johnson.)

Mr. LOMEN.—I am trying to show he didn't know anything about it at all.

The COURT.—When he comes back you may go through all this examination.

Mr. LOMEN.—If it please the Court the purpose of this testimony is to authorize this map to go in evidence as a correct plat of some claim that was located. I want to show this map was not based on the knowledge of anybody who knows anything about the claim at all and it cannot be introduced in evidence.

(Argument.)

The COURT.—I think the map is sufficiently proven.

Mr. COCHRAN.—I now offer the map in evidence if your Honor, please.

Mr. GRIGSBY.—We wish to finish our examination.

Mr. REED.—We object to immaterial matters and not directed to the exact point of the examination in chief.

Mr. LOMEN.—Before I get through with this witness I want to get evidence sufficient at least to have the jury pass upon the question as to whether those willow stakes he says he saw in 1902 were there when he fixed up the stakes in 1904. We want to find out how much he knew about it when he told the surveyor.

The COURT.—I think that is wholly irrelevant. I think the plaintiff has put the witness on the stand for a [30—5] specific purpose and I think it is

(Testimony of Gus Johnson.)

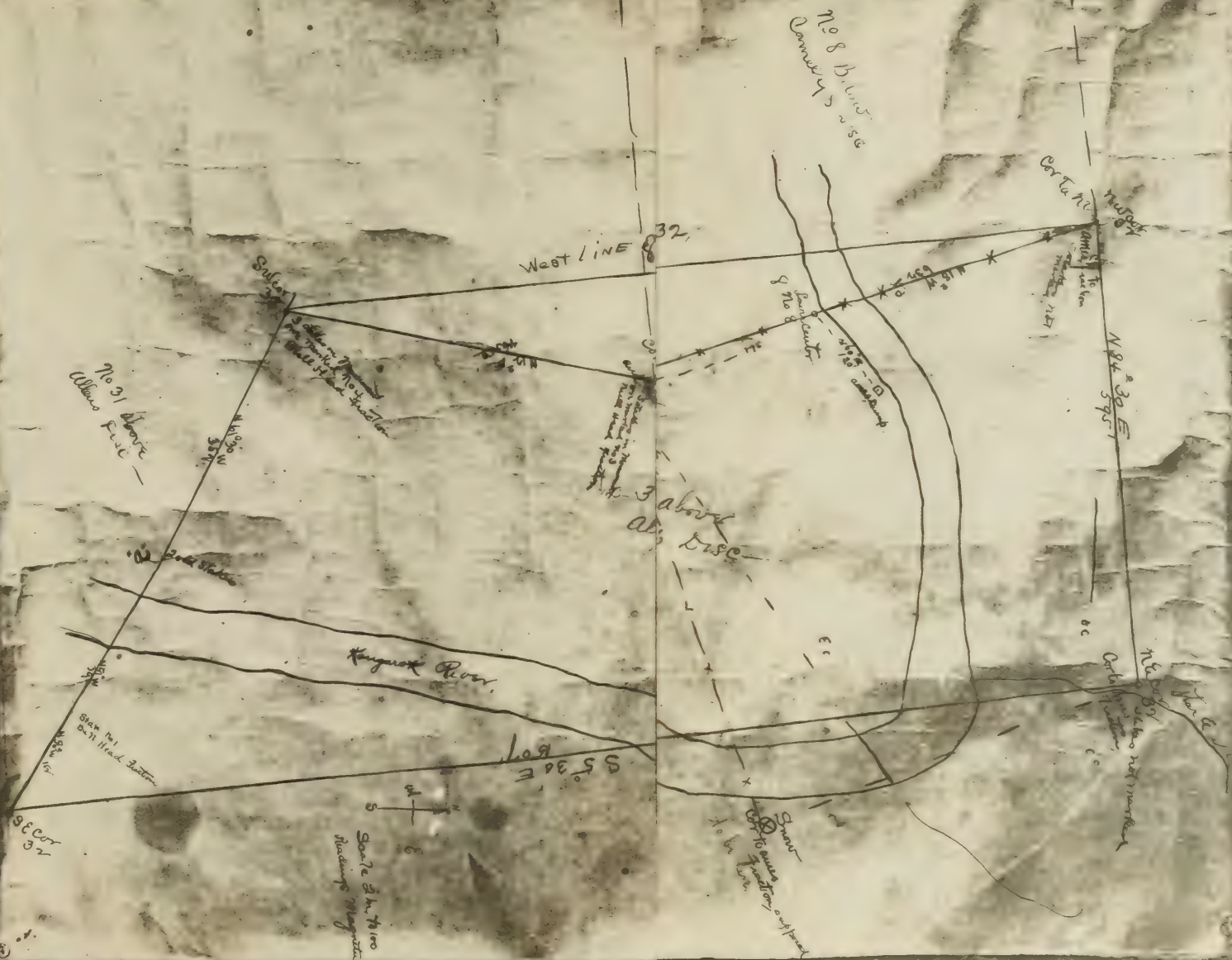
proven whether the map is to be admitted in evidence. The map is admitted in evidence.

Mr. GRIGSBY.—Our objection is there is no evidence whatever tending to identify the map as a map of the premises in controversy as claimed by plaintiff in his complaint and it is therefore immaterial; and the further objection the map is now ruled to be in evidence at a time when we are cross-examining a witness with reference to his competency and before we have closed our cross-examination.

Mr. COCHRAN.—We offer it and ask to have it marked Plaintiff's Exhibit "A."

The COURT.—All right.

To which ruling the defendant then and there excepted and an exception allowed. [31—6]



[Testimony of N. O. Windquist, for Plaintiff.]

Thereupon N. O. WINDQUIST was called as a witness for the plaintiff and testified as follows:

My name is N. O. Windquist; I am seventy-one years old; I live in Nome, Alaska, and have lived in Nome and vicinity since 1900. By occupation am a miner. Have lived in the Kougarok Precinct. I first went to the Kougarok Precinct in 1900 to Mary's Igloo and I knew Captain Kennedy in Mary's Igloo; have known him since 1875 up to the time of his death. I lived in the Kougarok in Kruzemapa on an island about two and one-half miles from Mary's Igloo. Was in Mary's Igloo in the winter of 1901; have lived near the mouth of the Kuzitrin off and on since 1901. Was at Mary's Igloo quite often that winter. Sometime before Christmas Captain Kennedy asked me to go down and take care of his store at Mary's Igloo and said he would locate me a claim on the Kougarok. I went down sometime [33—61½] before New Year's for that purpose. I know Tom Evans. I knew Methe and Gus Johnson. They were employed by Captain Kennedy at that time. I remained at Mary's Igloo until Captain Kennedy returned from the Kougarok with Gus Johnson. Tom Evans came in at the same time, or a short time afterwards. I don't know when Methe returned. When they returned Captain Kennedy showed me a copy of a notice of location, he showed me two location notices, he said "I have located two claims for you." The location notice was signed by my name as locator, by Mr. Methe as Agent, and

(Testimony of N. O. Windquist.)

Tom Evans as a witness. I know the hand-writing of Tom Evans. It was in the spring that Captain Kennedy showed me the notices and told me to go and make a discovery. I had a camp on No. 1 Above Allen's Discovery. The notice was recorded and given to me afterwards. Old man Gunderson was the Recorder. Captain Kennedy told me to go up to the claim, No. 32 Above Allen's Discovery and make a discovery, to come up and see them and I did so. He said he had put up the stakes and the claim was O. K. I never was upon the ground before the claim was located for me. The date of location contained in the location notice was the first part of January, 1902. I have not the location notice in my possession. It was a printed notice with some writing in it. I have not been able to find a copy of it.

(Witness excused.)

[Testimony of George J. McLean, Recalled, for Plaintiff.]

GEORGE J. McLEAN, recalled, testified as follows:

I was formerly the commissioner and recorder for the Kougarok Precinct. I have seen the record of the location notice of N. O. Windquist of No. 32 Above Allen's Discovery on the Kougarok. I hold a copy of it in my hand. It is in my handwriting, written while I was commissioner. It is a copy of the record of the notice."

On cross-examination witness testified as follows:

I don't know when I made this copy or whether

I made it for Mr. Ames or Mr. Windquist. I made one for Mr. Windquist and may have made [34—7] one for Mr. Ames. I would not say if I made the copies when I was commissioner and recorder.

Mr. COCHRAN.—I offer this copy of the location notice in evidence.

Mr. LOMEN.—Waiving the objection that the copy is not certified, we object to its admission for the reason that there is no proper foundation laid.

The COURT.—Objection overruled.

To which ruling the defendant then and there excepted and exception allowed.

Paper admitted in evidence and marked Plaintiff's Exhibit "B" as follows: [35—8]

[Plaintiff's Exhibit "B"—Placer Location Notice.]
3690. PLACER LOCATION NOTICE.

Know all men by these presents that I, the undersigned, have this day in accordance with the laws of the United States of America and the local rules and regulations and being otherwise legally entitled so to do, located and claim for placer mining purposes the following described tract of land situated on Kougarok River in Kougarok Mining District, District of Alaska, being a portion of the otherwise unoccupied Public Domain and situated for mining purposes only, to wit:

Commencing at the initial stake being the lower center end stake and upon which a true copy of this notice is posted; thence in a Northerly direction as near as practicable at right angles to the general course of the stream 330 feet to corner stake No. 1, thence at right angles in a Westerly direction up

stream and as near as practicable parallel to the general course thereof 1320 feet to corner stake No. 2; thence in a Southerly direction at right angles 330 feet to the upper center end stake, thence continuing on the same line 330 feet to corner stake No. 3; thence at right angles in a Easterly direction down stream as near practicable to the general course thereof 1320 feet to corner stake No. 4; thence at right angles 330 feet to the place of beginning, being the initial stake.

This claim shall be known as No. 32 Above Allen's Discovery on Kougarok River.

Located this ten day of January, A. D. 1902, in the presence of the undersigned witnesses.

N. O. WINDQUIST,

Locator.

By N. METHE,

Agent.

Witnesses:

T. H. EVANS.

Filed for record 1 P. M., March 29, 1902.

LARS GUNDERSON,

Recorder. [36—9]

[Testimony of N. O. Windquist, Recalled, for
Plaintiff.]

N. O. WINDQUIST, recalled for plaintiff, testified as follows:

I heard the location notice just read. It is substantially the notice that was given me by Captain Kennedy when I was in Mary's Igloo. After that I went to the claim, in the latter part of June, 1902. Captain Kennedy and I examined the claim and dug

(Testimony of N. O. Windquist.)

some holes and did some panning there. I looked at the stakes and went around to all the stakes. The map on the wall, Plaintiff's Exhibit "A," is a correct map of the boundaries as I saw them. I found the location notice at that time on the initial stake. It was a willow stake marked initial stake of No. 32 Above Allen's Discovery, N. O. Windquist. I put a mound around the stake; the location notice was in a slit in the stake with a can over it. I read the notice very carefully and as far as I can see the one read in evidence is exactly the same. I went to all the corners of the claim. All the stakes were three or four feet high and marked the name of the claim and the designation of the corner. The stakes were all firmly planted in the ground. I made a discovery of gold at that time in several places by panning dirt from the holes I dug and found gold in sufficient quantities to lead me to believe that it was valuable for gold. That is the reason that I took good care of it. I know Gus Johnson. He was on the stand in this case; have known him since 1900. I talked with him about the claim in my house before I went up there, about going up there and working on the claim. I gave him full control either if he wanted to sell or work it or do anything. I left it to his best judgment. Gave him permission to take out all he wanted and do what he pleased with it, that was the understanding between us. I was on the claim again in 1912. I was there between 1912 and 1902. Cannot remember what years. Never did any work on the claim except when I went up

(Testimony of N. O. Windquist.)

and discovered gold on it myself. I had Gus Johnson and Captain Kennedy do work there [37—10] every year. After I found out the people were so bad up there I sold the claim to Jerry Sullivan, I sold it to him last year. Gave him a deed. I have no personal interest in the claim now nor any interest in this lawsuit. No one did the assessment work on this claim except Captain Kennedy and Gus Johnson. I was taking care of other ground for Gus Johnson and for Captain Kennedy and they were taking care of this ground for me. We were exchanging labor. I was on the claim in 1912 and the stakes of the claim were in the same place as when I was there in 1902. They were not the same stakes but were in the same places.

On cross-examination witness testified as follows:

The notice given me by Captain Kennedy that I have referred to was signed "N. O. Windquist by N. Methe, Agent, dated January 10th, 1902." I cannot remember whether or not Tom Evans' name was upon the first paper received by me from Captain Kennedy, that is as a witness on the location notice, it was so long ago. I testified at the former trial that the signature of Tom Evans upon the notice which was recorded was his true signature. I knew his hand-writing for he told me so. I don't remember testifying anything about his hand-writing. I know it was his signature because he told me so in Mary's Igloo. I cannot remember that Tom Evans and I had the original notice between us and that Tom Evans admitted that he signed it. He said to get them, mean-

(Testimony of N. O. Windquist.)

ing him and his friends, in some quartz locations if I saw any good ones and he said that they had located a good claim for me and that is the way it came up, and he said he had signed the location notice. In going from my cabin in Kruzemapa to No. 32 Abode Allen's Discovery in the spring of 1902 I went by boat to Mary's Igloo and from there by boat up to Birch Hill and from there walked to Checkers Town. It is about twenty miles from Mary's Igloo to Checkers Town. I first saw the location notice of No. 32 Above. [38—39—11] Allen's Discovery along in April, 1902, when it was brought me by Captain Kennedy. Between the 10th day of January, and when Captain Kennedy brought me the notice Kennedy had been all over the Kougarok, sometimes he was in Taylor, sometimes he came down and stopped with us and other times was in the upper Kougarok. Captain Kennedy did not tell me he was with Mr. Methe when Methe located the claim for me. He told me he located two claims for me. He did not tell me that he had done it personally. Going from Mary's Igloo to Checkers Town I went overland. I went to Birch Hill and then walked to Checkers Town. I went by boat from my cabin at Kuzemapa to Mary's Igloo, from Mary's Igloo by boat to Birch Hill and we pulled the boat up there and from there I walked over the hill to Checkers Town. I had to see Lars Gunderson. From Checkers Town I went on up the Kougarok. I left the Kuzitrin and went up the Kougarok. Am positive I did meet Commissioner Gunderson at Checkers Town on that

(Testimony of N. O. Windquist.)

trip. A man named Preston was there also. I do not know where he is now. He left there years ago. Gunderson is dead. Yes, Captain Kennedy is dead. Yes, I saw others on this trip. There was a man who went with me in the boat from Mary's Igloo, and there is Mr. Shelton, he is not dead. I don't know where he is. I don't remember where I met Mr. Shelton. I saw him at Shelton, a place named after him. There was a roadhouse there at that time. Checkers Town lays farther up the river; I do not know how far. I don't remember whether I stopped at Shelton on my way up or not. I don't know whether I passed the mouth of California Creek; I don't remember that name; I am not well acquainted with the upper Kougarok. I don't remember any camp on the Kougarok River below No. 32 Above Allen's Discovery except Kennedy's camp. I don't remember whether I went as far as the mouth of Taylor Creek on that trip or not. I do not know where the mouth of Taylor Creek is. I don't know whether it is above or below [40—12] No. 32. I do not know any of the tributaries between No. 32 Above Allen's Discovery. I claim title to No. 32 Above under the location made by N. Methe for me on January 10th, 1902. After I left No. 32 on this trip I went back home to Mary's Igloo. I had been gone on that trip five or six days.

Q. Did you have any provisions with you when you left Mary's Igloo?

A. I had friends all along the river and I could get all the provisions I wanted that way.

(Testimony of N. O. Windquist.)

Q. Who were your friends you had along the river?

A. My shotgun and dogs and there were Captain Kennedy and Preston and Lars Gunderson.

I do not know how far it was from my cabin in Kruzemapa to No. 32 on the Kougarok River. I was traveling in the night-time. I don't remember how many nights' walk it was. It was not two nights' walk. Maybe a little over a day, some of the night and some of the day. I think I could make the trip in twelve hours from my cabin to No. 32 Above. To-day it would take me a couple of days. I had a talk with Gus Johnson about going up there that spring and working on the claim. He had full control either if he wanted to sell or work it or do anything. I left it to his best judgment. He could take out all he wanted to and do what he pleased with it, that was the understanding. I said that when Tom Evans told me about signing my location notice as a witness the language he used was to the effect that I was to get them in some good quartz locations if I saw any good ones and that he thought they had located a good claim for me. At the time I made this trip I think I could have made it in twenty hours. I took no sleep during the trip. The character of the ground I went over was swamps and hills. Pretty near swamp the whole way. I made the distance from Checkers Town to No. 32 in one stretch, to the [41—13] best of my memory. I was seen by several persons on the way between Checkers Town and No. 32. I met a man named Larson, I think, I am not positive, I don't know where he was working. I

(Testimony of N. O. Windquist.)

don't remember who else I met. I met others. I don't remember any of them. I don't remember whether I testified on the former trial of this case that I didn't meet anybody between Checkers Town and No. 32. I knew several people on the Kougarok River in the summer of 1902. I don't remember such a creek as Neva Creek. I was on the Kougarok River on this trip during the afternoon and night and came back the next morning. I stayed on No. 32 four or five hours, maybe more, and went right back home. I slept in the open all the time on this trip. I think I slept with Judge Gunderson. I don't remember whether it was coming or going. I don't remember how many camps I passed. There might have been some tents between Checkers Town and No. 32 Above Allen's Discovery. I don't know of any roadhouse between Checkers Town and No. 32. I stopped at noon. I could get all the food I wanted to when I came to Captain Kennedy's and I took lunch from Checkers Town. Kennedy and Gunderson were the only persons I got food from on this trip. I took some lunch with me, I had two dogs.

Q. You didn't take anything with you from home?

A. Yes, sir, I did.

Q. I thought you told us you did not.

A. I never told you that, I wouldn't leave home empty-handed.

Q. What did you carry it in?

A. The dogs carried it.

Q. The dogs carried it? A pack saddle?

A. Yes, sir.

(Testimony of N. O. Windquist.)

I do not remember meeting George Thompson on my way, I might have. The same applies to Paddy Flynn. I might have met Al Wentworth. [42—14] I don't remember meeting Bill Spencer or Mike Hurley or Bert Glass or Lee Marshall, I might have. I met him several times; nor Alec Armstrong, nor Charles Merritt. I suppose I passed California Creek. I don't remember a roadhouse there. I don't remember meeting Kid Fisher at Taylor Creek. I might have met Jim Turner. I don't remember meeting Fred M. Boden.

Q. Did you meet Wm. Benty?

A. I don't understand what you mean.

I don't remember passing Arctic Creek. I don't remember meeting Jim McAllister or Bert Glass, I might have met Henry Wells and Jud Chidester. I don't remember who I met coming from my house this morning to the courthouse, it would be impossible for me to tell you. I cannot remember meeting Henry Wells or Burbank or Nels Granhome or Bobbie Brown or Jules Gunderson, or F. A. Chase or Jack Smith or Theodore Smith or Gunder Sather. I did not meet Gus Johnson; I looked for him but did not meet him. I don't remember meeting John Moberg. I met but a few men between Kennedy's camp and No. 32. Kennedy spoke to a couple of men, I don't recall their names. I did not testify at the former trial that I did not meet anybody but Captain Kennedy.

(Witness excused.)

[Testimony of Gus Johnson, Recalled, for Plaintiff.]

Thereupon, GUS JOHNSON was recalled as witness on behalf of plaintiff and testified as follows:

I am a miner by occupation. I have been in the Seward Peninsula since 1900. I went to the Kougarok Precinct in 1900; have lived there ever since. I know N. O. Windquist the witness who was just on the stand; have known him since 1901. I knew Captain Kennedy, got acquainted with him in 1901. I know N. Methe and Alec Armstrong, also Tom Evans who was present in the courtroom. Have known them since 1901. At that time I was hauling freight up to Macklin Creek from Mary's Igloo for Captain Kennedy. Tom Evans was driving horses [43—15] for Captain Kennedy. N. O. Windquist was prospecting for Captain Kennedy. Armstrong was prospecting for himself. We worked for Captain Kennedy all of that winter and the spring of 1902. I lived that winter at Mary's Igloo at Captain Kennedy's. Windquist was living in a cabin below at Kruzemapa two or three miles from Mary's Igloo. Captain Kennedy and I and Tom Rhules and Joe Moran left about the first of the year 1902, to stake some ground and were gone six or seven days. At that time Tom Evans and N. Methe were prospecting up at Macklin Creek. The mouth of Macklin Creek is about three miles northwest of No. 32 Above Allen's Discovery on the Kougarok River. When we returned to Mary's Igloo Methe had not returned. Tom Evans came down later on in February. He made out some location notices down there. I did

(Testimony of Gus Johnson.)

not at that time see any location notice of No. 32 Above.

Q. How did you learn of a location notice at that time? I don't care now how, just generally, did you learn of a location notice of No. 32 for Windquist?

Mr. GRIGSBY.—Objected to as hearsay.

The COURT.—Overrule the objection.

(To which ruling the defendant then and there excepted and exception allowed.)

A. He was talking about it.

After that I had a conversation with N. O. Windquist in which he told me I could go up there and take out all I could from No. 32. That conversation was in the spring of 1902. Pursuant to that understanding I went up there in the first part of July, 1902, and did some prospecting on No. 32 along the river up and down pretty near the whole length of the claim. I panned gravel and found colors of gold in sufficient quantities to lead me to believe that the ground was valuable for placer gold. I examined the markings of the claim No. 32 [44—16] Above Allen's Discovery in the month of July, 1902. Yes, I was with the Surveyor McLean when the map exhibit "A" was made and pointed out to him the various stakes on the ground. I found the initial stake of the claim at this point designated on the map by the letter "A." There was just one stake there in July when I went there. It was a willow stake. There were old pencil writings upon it. The words "Initial Stake of No. 32" and Windquist's name was on it. There was a location notice on that stake. The stake was

(Testimony of Gus Johnson.)

slit and the notice was folded up and put in the slit and there might have been a can over it. I read the location notice. Mr. Windquist's name was on the location notice as locator. All this happened in July, 1902. I also saw the corner stakes; they were marked the southeast corner, southwest corner, northeast corner and northwest corner of No. 32. They were all willow stakes at the various corners. They were blazed. I don't remember whether there were any mounds around the stakes or not. The boundaries of the claim were distinctly marked upon the ground. The next day I did the prospecting on No. 32. I did not thereafter return to the claim that year. I was there in 1903, in the fall, and did some prospecting and assessment work for that year on that claim for Mr. Windquist. Mr. Windquist and I were exchanging work. The work I did in 1903 on the claim was on the lower end and on the rim. (Witness points out on the map exhibit "A" the corners of No. 32 indicating the southwest, southeast, northeast and northwest corners as marked on the map.) I was on the claim in 1903 off and on quite a length of time. The stakes I saw in 1902 were not there in 1903. There had been some tundra fires in that country. I do not know what became of the stakes, had not removed them myself nor consented to their removal. I was back there in 1904, sometime in June. There were no stakes there but I replaced them, placing them in the same places they are now and in the same places that the original stakes [45—

(Testimony of Gus Johnson.)

17] were placed in 1902, and they are now in substantially the same places as they were in 1902. The stakes I placed upon the claim in 1904, were willow stakes. The stake I put at the point marked "A" on the map was the initial stake. It was a willow three feet long and I put it in the ground and put a monument around it. It was blazed. It was marked initial stake of N. O. Windquist and the number, and the stakes placed at the four corners were similar to the initial stake. I was last upon this claim in 1912. The stakes I placed there in 1904 were all there except the initial stake. It had disappeared. I pointed them out to the surveyor who surveyed the claim at that time. I worked upon this claim in 1904 for Mr. Windquist. During *these* period of years I exchanged work for Windquist every year. He did the assessment work for me and I did the assessment work on his claims. I did the work upon this claim No. 32 for Windquist in 1904, 1905, 1906, 1907 and I believe in 1908. In 1909 I had it done by Mike Blum, and also in 1910 and paid him for it by working for him. I did the work in 1911. I was over there and attempted to do the work in 1912, but got chased off by Mr. Ames. I did not work in 1913. During each of the years I have mentioned I did one hundred dollar's worth of work upon this claim, or had it done, and made out proofs of labor, swore to them and filed them of record in the Kougarok Precinct.

Cross-examination.

I have known N. O. Windquist since 1901. Be-

(Testimony of Gus Johnson.)

came his agent in April, 1902. He told me to go up there and prospect and see what I could find on No. 32. I was his agent for the purpose of prospecting and doing assessment work and looking after the claim for him. There was no assessment work to be done that year but he told me to go up and prospect and see if I could find any money and that I could take it. This conversation was in April at Mary's Igloo, at Captain Kennedy's cabin. That is not the reason I went up there, I was going [46—18] up anyhow to do some prospecting and he asked me to prospect on No. 32. I told him I would. He did not tell me to make a discovery of gold for him. I was up and down, back and forth from Mary's Igloo to Allen's Discovery several times that spring. Allen's Discovery is about four miles or five miles from No. 32. I was hauling provisions up there. I stayed up there all summer. I prospected on No. 32 in the first part of July, 1902. No one showed me the stakes, I found them myself. The location notice was at the initial stake. It read "N. O. Windquist, Locator, by N. Methe, Agent" and was signed with the name of Tom Evans as a witness. There was no name scratched or rubbed out where Windquist's name was written. I do not know in whose handwriting it was. I think it was Captain Kennedy's. I do not know whether Tom Evans' signature was in his handwriting or not. The initial stake was marked in Captain Kennedy's handwriting. The name of N. O. Windquist was on it in Kennedy's handwriting, I am pretty sure about that. The stakes were just stuck in the ground. There were no mounds

(Testimony of Gus Johnson.)

around them that I remember of. I could not find any stakes in 1903 but had no trouble locating the corners. I knew where the initial stake was. I made a mark there by digging a hole in 1902. That is the way I found where the initial stake was. I found the corners by stepping them off in 1903, and put stakes just as near as I could where the old stakes were but had nothing to go by except stepping off. Did not find any mounds. If I had found mounds I would not have had to step them off. No sir, I did not find any mounds. Oh, yes, there were piles of rock, lots of piles of rock which might have indicated the corners. I found them. Yes, I had to step off because I could not find the corners any other way. I found the corners by piles of rock and by stepping them off, both. There were some rocks at one corner on the southeast corner but at no other corner. The other piles of rock might have been burned up by the tundra fire. I don't remember whether it was a tundra fire or what it was destroyed the stakes. I did not see Windquist up there in the summer [47—19] of 1902. The next time I saw Windquist, which was in 1903, I told him I had found prospects on No. 32, colors. It is between forty and fifty miles from Mary's Igloo to No. 32 Above Allen's Discovery. I never heard that summer that Windquist was up there on No. 32 while I was there, nobody ever told me. The first time I ever heard of it was when Windquist told me in 1903. In 1912 when I got chased off the claim I had attempted to work upon the middle of the claim. It was not on the

(Testimony of Gus Johnson.)

ground in conflict with the Kshunti Fraction but close to the line. Mr. Ames, the defendant, was in possession of the Kshunti Fraction at that time. He was about to take out a dump. I did not attempt to work on the Kshunti Fraction. I knew the boundaries of it at that time. He chased me off the ground in conflict. He got hold of me and told me to get off the ground. Went with me a little ways. I may have said to Ames at that time that I did not know where his claim was. I don't remember whether he said to me "There is my line" and led me off the Kshunti Fraction or not. I did not attempt to go to work on No. 32 in 1912 because he stopped me. There was lots of ground there outside of the Kshunti Fraction. I did not work there, he wouldn't let me. I don't know of anybody else doing any work there in 1912. Nobody did any that I know of. At that time I stayed there two or three hours and then went home down below on the Kougarok River.

Q. You were Windquist's agent then?

A. Yes, sir.

Q. Looking after this claim? A. Yes, sir.

I filed no proof of labor or anything else that year that I remember of. [48—20]

Redirect examination.

When I went to do the assessment work on this claim in 1912, it was after the commencement of this action. I had Brose with me to help me. Mr. Ames claimed to be in possession of all of claim No. 32. He said so. He told me to get off the claim if

(Testimony of Gus Johnson.)

I wanted to keep out of trouble. "Get off the ground" he said. I guess he was referring to claim No. 32. It was in the fall of the year of 1912 that I attempted to do the assessment work on No. 32 in November. Ed Brose was with me. We worked one day close to the line of the Kshunti Fraction and the next day Ames would not let us work. The conversation between Ames and I took place on No. 32 in the hole where I was working. He told me to get out of there, that he would see that I did get out and took hold of me. I wrote Windquist about that affair. (Letter shown to witness.) Yes that is the original letter I wrote to Windquist at that time on the 30th of November, 1912. It is in the Swedish language. (Witness shown translation of letter into the English language.) Yes that is a translation of the letter.

Mr. COCHRAN.—I offer the letter in evidence together with the translation.

Mr. GRIGSBY.—Objected to as incompetent, irrelevant and immaterial and self-serving. We move that it be stricken out and that the jury be instructed to disregard it as self-serving and hearsay.

Motion denied. Letter admitted in evidence and marked Plaintiff's Exhibit "C," to which ruling defendant then and there excepted and exception allowed. [49—21]

**Plaintiff's Exhibit "B" [Letter, November 30, 1912,
Johanson to Windquist].**

Taylor, Alaska, November de 30, 1912.

Besta Winqvist,

Jag vill skrifa nagra rader till dig och lata dig veta hur jag moi jag hor halsan och moi godt.

Jag har varit uppa No. 32 och gort som arbete men Ames han ville inte lata mig arbete der vi hade lite trubel han var efter mig varje dag. men i dag sa kam han och hatade mig med slags mal sa jag lemnade jag vill inte blifva ijalslagen han sade att han shall vinna den clammen om han shall sla ijal nagra stycken sa jag vill inte taga nagan tjenst du kan ga och se Reed vad vi skall gara.halsa sa godt till Anna jag anskar att han mar godt.

Jag innesluter en kar halsneng fran mig till dig.

GUST JOHANSON.

(Translation of letter written from Taylor, Alaska,
by one Gus Johnson to N. O. Windquist, Nome,
Alaska.

Taylor, Alaska, November 30, 1912.

I have been up on No. 32 and done some work but Ames did not want me to work there. We had a little trouble. He was after me every day but to-day he came and threatened me with violence and I left as I did not wish to be pounded to death. He said that he would win that claim if he had to kill a number of persons so I did not wish to take any further chances and I left. You can go and see Reed about what we shall do.

Yours,

GUS JOHNSON. [50—22]

Recross-examination.

I think I was south of the line of the Kshunti Fraction when I went up there to do the work on No. 32 Above Allen's Discovery in 1912. I am not positive. I might be mistaken. I do not know whom the Bull Head Fraction was staked for; it was not for Mr. Ames. I did not know if he claimed it or not. He told me that he claimed all of No. 32 in a conversation we had sometime before that. I did not know Ames claimed the Kshunti Fraction in 1904. Never heard of it at that time. Might have heard of it in 1905. I knew it long before this action was commenced and knew where the south line of it was. From 1905 on Mr. Ames had never interfered with my working on the lower part of No. 32. That is where I had done all my work. I never did any north of that line. Ames had been on the Kshunti Fraction before 1912. I don't think I ever done any work on the Kshunti Fraction.

Re-redirect Examination.

Mr. Ames tried to hit me twice when he put me off the claim. Broste was down in Ames' cabin. He could not get out because he was locked in.

Re-recross-examination.

That was in 1912 when we were doing the assessment work. Broste was locked in Ames' cabin. Ames called him down to the cabin and locked him in. At least that is what Broste said. It is not a fact that prior to 1912 I, as agent for Windquist, and Mr. Ames, the defendant, established a line between the Kshunti Fraction and No. 32. We did not

(Testimony of Gus Johnson.)

establish any line. I don't remember whether or not I had a conversation with Ames in 1911 on the claim or in the vicinity of it, in which I told him that I had authority to handle the ground, and Mr. Ames and I did not agree upon a boundary line pursuant to such conversation. I don't remember whether I had a conversation about [51—23] that or not. I was up there in 1911 doing the assessment work in the fall sometime. I don't remember having any conversation at that time with Mr. Ames in the presence of myself and Mr. Ames on the claim or in the vicinity of the claim with reference to establishing a boundary line. I never established any line, I don't remember anything that was said with reference to whether I had authority to handle the claim or not. I will not swear that it did not happen. I don't know what was said. There was a conversation but I don't remember what we said.

Q. Will you swear that conversation I related to you did not take place? Answer yes or no.

A. I don't understand.

Q. All right, you don't understand. Now, did you not at that time, in conjunction with Ames, establish a boundary line between the Kshunti Fraction and No. 32?

A. I never established any boundary line nor agreed upon a boundary line. I don't remember any talk about that. Tom Chase was with me in 1911 doing the work.

I was Windquist's agent at that time and had authority to handle the claim. Mr. Ames did not

(Testimony of Gus Johnson.)

offer to throw off a small portion of the Kshunti Fraction to effect a settlement and avoid litigation. He said he would not give one inch. At that time I was working pretty close to the same place that I attempted to do the work in 1912.

Re-re-redirect Examination.

I had no authority from Windquist to throw off any of the claim.

(Witness excused.) [52—24]

[Testimony of Jerry Sullivan, the Plaintiff, in His Own Behalf.]

JERRY SULLIVAN, plaintiff, called in his own behalf, after being duly sworn testified as follows:

Direct Examination.

I did have a deed from Windquist to No. 32 Above Allen's Discovery but I have lost that deed and some other papers since I came to this town. The last I remember of having it was on the morning of the 4th of this month when I left my cabin on Trinity Creek in the Kougarok District. I have a copy of the deed. (Referring to paper handed him by counsel.) This is the deed given me to-day by Mr. Windquist. I have searched for the other deed that I lost on the 4th of this month and have not been able to find it. The first deed was given to me on the 19th of May, 1913.

(Deed admitted in evidence and marked Plaintiff's Exhibit "D" as follows:)

Plaintiff's Exhibit "D" [Deed].

THIS INDENTURE made the 15th day of October in the year of our Lord one thousand nine hundred and fourteen BETWEEN N. O. Windquist of Nome, in the District of Alaska, the party of the first part, and Jerry Sullivan, of Kougarok Precinct, Alaska, the party of the second part,

WITNESSETH, that the said party of the first part, for and in consideration of the sum of One (\$1.00) Dollars, Gold Coin of the United States of America, to him in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and forever quit-claimed and by these presents do grant, bargain, sell, remise, release and forever quit-claim unto the said party of the second part, and to his heirs and assigns all the right, title and interest of the party of the first part in and to that certain mining claim known and described as Number Thirty-two (32) Above Allen's Discovery on the Kougarok River in the Kougarok Recording Precinct in the District of Alaska. This deed is given to confirm a deed heretofore executed by the first party on May 19th, 1913 to, and delivered to said second party, conveying all my interest then and therein to second party.

TOGETHER with all and singular the tenements, hereditaments, appurtenances, rights and privileges thereunto belonging or in anywise appertaining, and the rents, issues and profits thereof; and also all the

estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part of, in or to the said premises and every part and parcel thereof, with the appurtenances.

TO HAVE AND TO HOLD all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, and to his heirs and assigns forever.
[53—25]

IN WITNESS WHEREOF the said party of the first part has hereunto set his hand and seal the day and year first above written.

N. O. WINDQUIST. (Seal)

Signed, sealed and delivered in the presence of:

T. M. REED.

O. D. COCHRAN.

United States of America,
District of Alaska,—ss.

On this 15th day of October, A. D. One thousand nine hundred and fourteen, personally came before me the subscriber, a notary public in and for said district, the within-named N. O. Windquist, to me personally known to be the identical person described within and who executed the within instrument and acknowledged to me that he executed the same freely, for the uses and purposes therein mentioned.

WITNESS my hand and seal this 15th day of October, 1914.

[Seal]

T. M. REED,

Notary Public in and for the District of Alaska.

(Testimony of Jerry Sullivan.)

I did have the location notice of No. 32 given to me by Windquist. I last saw it on the morning of the 4th of this month. Have searched diligently for it and for the other papers including the deed that I had together, and have not been able to find them anywhere.

Cross-examination.

I knew of this litigation when I bought this property. I did not consider that I was buying a lawsuit. I knew I was buying the claim from the rightful owner. I had the deed in my cabin prior to the 4th of this month. I carried it in my pocket. I had the deed in the same coat pocket as the notice of location. Also a letter that Tom Evans had written to me in regard to some assessment work and the proof of labor, all in the same pocket. I did not have the deed and notice of location in my pocket at the time I showed the letter from Evans to Mr. Grigsby in his office. I first discovered the [54—26] loss of the deed and notice when I was up in Judge Reed's office. This was on the 9th of this month. I thought I had left them up to my cabin but I could not find them afterwards although I searched diligently. I am sure I had the deed and location notice in Nome. The only place I took the papers out was up in Windquist's cabin. I am sure I took the papers from there to my cabin. I did look in Windquist's cabin for them afterwards thinking I might have left them there but was almost positive that I did not.

Q. Is anyone else interested with you in this title

(Testimony of Jerry Sullivan.)

that you claim to have acquired from Mr. Windquist?

A. There is not.

Q. No one at all? You own it all?

A. Yes, sir.

Q. All the Windquist interest yourself?

A. Yes, sir, all of No. 32.

(Plaintiff rests.)

DEFENDANTS THEREUPON INTRODUCED
THE FOLLOWING TESTIMONY:

[Deposition of N. Methe, for Defendant.]

The deposition of N. METHE was offered and read in evidence as follows:

Q. State your name, age, residence and occupation?

A. Narcisse Methe, 51 years old, 70 Jouvette Street, New Bedford, Mass. Carpenter and joiner.

Q. Where did you reside during the period from 1901 to 1909 inclusive?

A. In the Kougarok Recording District, District of Alaska, except in the winter of 1903, 1905 and 1906—I spent those winter seasons with my family where I am now living. [55—27]

Q. Were you in 1901 or 1902 acquainted with one Heinze, and if so where did you know him and when did you become acquainted with him?

A. I was acquainted with Heinze in the fall of the year 1900 at the mouth of Sinrock River.

Q. At said times in 1901 and 1902 were you acquainted with T. H. Evans, J. C. Kennedy, John Moberg, L. A. Peel, A. C. Armstrong and N. O. Windquist?

(Deposition of N. Methe.)

A. During 1901 and 1902 I became acquainted with T. H. Evans, J. C. Kennedy, John Moberg, A. C. Armstrong, but as to L. A. Peel, I do not remember that name; and N. O. Windquist, I have seen him at Mary's Igloo once or twice in the winter of 1901.

Q. Did you ever locate a claim known as No. 32 Above Allen's on the Kougarok River in the Kougarok Recording District, District of Alaska, either for yourself or as agent for another?

A. I did, as agent for Heinze stake No. 32 Above Allen's Discovery on the Kougarok River, District of Alaska.

Q. If you answer that you did locate a claim of that name as agent for another, who was the person for whom you located said claim?

A. It was Heinze I staked for.

Q. When did you make said location?

A. On or about January 10th, 1902.

Q. Were you at the time of making said location, or shortly afterwards, familiar with a claim known as No. 31 Above Allen's Discovery on the Kougarok River, also No. 8 Below Connelly's Discovery on the Kougarok River and the Kshunti Fraction?

A. Yes, later I was acquainted with No. 8.

Q. When did you become acquainted with those claims?

A. I became acquainted with No. 31 Above Allen's about the time of staking; with No. 8 later on.

Q. If, in answer to a previous interrogatory, you have stated that [56—28] as agent for one Heinze you located No. 32 Above Allen's Discovery on the

(Deposition of N. Methe.)

Kougarok River on January 10, 1902, state whom, if anyone, was present when you made said location and whether anyone assisted you in making said location?

A. Thomas H. Evans, and he assisted me.

Q. State what you did in making said location on January 10th, 1902, describing every act performed by you or any perosn who assisted you in making said location, describing the different steps you took that day with reference to locating said No. 32 Above on the Kougarok?

A. As well as I can remember, No. 31 was butting against No. 32, that is, upper northwest corner of #31 was making southeast corner of #32, crossing the river twice, inclosing the most part of the left limit. The upper center stake of No. 32 was put up on the left limit of the Kougarok River, on a little bluff as well as I can remember. Evans helped me to do this work.

Q. State whether or not you completed your location that day or whether you finished up the location at a later date?

A. We put the stakes that day and the notice later on.

Q. State whether or not at any time either prior to January 10th, 1902, or thereafter you made a discovery of gold within the exterior boundaries of No. 32 Above Allen's Discovery and if so when you made said discovery and on what part of said claim and who, if anyone, was present and what amount of gold,

(Deposition of N. Methe.)

if any, you discovered.

A. I have made many discoveries in the Kougarok, but as to No. 32 I don't remember.

Q. State whether or not you posted any location notice upon said No. 32 Above Allen's Discovery on the Kougarok at the time of making said location or thereafter and if so state whether or not any [57—29] person signed said location notice as a witness and who said person was.

A. We put up notice and Evans was the witness.

Q. If you have answered that you did post a location notice on said claim, state whether or not you caused a copy of duplicate of said notice to be recorded and what steps you took to have the same recorded.

A. I sent notice to Register by J. C. Kennedy.

Q. Who was the recorder in the Kougarok Recording District at that time?

A. I think it was the old gentleman Gunderson.

Q. To whom, if anyone, did you give said notice to be recorded? A. To Capt. Kennedy.

Q. Whose name, if any one, was given in said notice as locator and what name as a witness and what name as agent for the locator?

A. Heinze as locator, T. H. Evans as witness, and N. Methe as agent.

Q. What kind of stakes or mounds, if any, did you use in locating said claim and how many stakes or monuments, if any, and where did you place them with reference to said claim?

(Deposition of N. Methe.)

A. Willow stakes 4 or 5; one initial stake, one on each corner, but I don't remember whether we put the upper stake at that time.

Q. If, in answer to interrogatory six, you have stated that you located No. 32 Above Allen's Dis. on the Kougarok for one Heinze, state how long you have known said Heinze before said location.

A. Close on to two years as well as I can remember.

Q. Where were you living at the time of said location and who else, if anyone, was living at the same place?

A. On the Upper Kougarok River (Macklin Creek) John Moberg, T. H. Evans and some more persons whom I may not remember—the nearest people was below Allen's Discovery. [58—30]

Q. What other persons were living in the vicinity of claims known as No. 31 and 32 Above Allen's Discovery and No. 8 Below Connelly's Discovery at the time said location was made?

A. A. C. Armstrong, Charlie Merritt, W. Benty and John Allen.

Q. If, in answer to a previous interrogatory, you have stated that you gave the location notice of No. 32 Above Allen's Discovery to J. C. Kennedy to be recorded, state whether or not you authorized him at any time to make any change in said location notice with reference particularly to changing the name of the locator named therein.

A. I never authorized such a change.

Q. Did you ever authorize him to substitute the

(Deposition of N. Methe.)

name of N. O. Windquist for the name of—— Heinze in said notice?

A. No, I never authorized him to change name.

Q. Did you ever, at any time, locate any claim on the Kougarok River for N. O. Windquist?

A. No.

Q. Where were you during the months of June and July, 1902?

A. Most of the time on Solomon Creek towards the head of Taylor Creek.

Q. If, in answer to the previous interrogatory, you state that you were on the Kougarok River in the vicinity of No. 32 Above Allen's Discovery or elsewhere on said river, state with whom you were living and what other persons were living in that vicinity.

A. I was living with Evans as well as I can remember—in June, but I was alone later.

Q. If, in answer to a previous interrogatory, you have stated that you located No. 32 Above Allen's Discovery on January 10, 1902, or thereafter, state whether or not you saw stakes of said claim during the spring or summer of that year and what, if anything [59—31] you did with reference to said claim?

A. I can't recollect exactly.

Q. Did you, during the months of June or July, 1902, see N. O. Windquist on the Kougarok River at the cabin of J. C. Kennedy or elsewhere in the vicinity? A. No, I never did see him.

Q. If N. O. Windquist had stopped for the period of one day or more at J. C. Kennedy's cabin at any

(Deposition of N. Methe.)

time during the months of June or July, 1902, would you have seen him and if so, tell why?

A. No, I was at Solomon Creek at that time.

Q. State whether or not it is possible that N. O. Windquist could have left Mary's Igloo in the Kougarok Recording District in the months of June or July, 1902, and gone to the claim known as No. 32 Above Allen's Discovery on said Kougarok River and stopped on the occasion of such visit at the cabin of J. C. Kennedy without your having known it.

A. I don't know, I was not there at that time.

Q. If you answer that said Windquist could not have made said trip under such circumstances without your having known it, state why and all the circumstances within your knowledge as to who lived in the vicinity at that time and what stopping places if any there were for travellers.

A. I do not know.

Q. Were you on No. 32 Above Allen's Discovery on the Kougarok River after the months of June and July, 1902, during the same year and did you, after said months, see any other stakes on said claim other than those placed there by yourself for Heinze?

A. Later in the summer I was in Kougarok but I don't remember going on No. 32 Above Allen's Discovery.

Q. Did you examine said claim to such extent that you would have seen any additional stakes had they been there? [60—32]

A. I don't remember.

Q. Did you ever have any conversation with the

(Deposition of N. Methe.)

said N. O. Windquist with reference to his having been on said claim during the summer of 1902 or with reference to said claim and if so state what the conversation was, where it took place, and who, if any one, was present?

A. I never had such conversation.

Q. When, if ever, did you discover that N. O. Windquist claimed to be the owner of No. 32 Above Allen's Discovery on the Kougarok and did you ever have any conversation with the said N. O. Windquist or in his presence with reference to said location? If so, state the conversation, where it took place, and who was present.

A. I think it was Evans told me first.

Q. Can you draw a rough map of No. 32 Above, No. 31 Above Allen's Discovery and No. 8 Below Connelly's Discovery and if so will you please do so and hand the same to the notary taking this deposition who will mark the same Defendant's Exhibit "A" and attach it to this deposition?

A. Yes, I will.

Q. N. O. Windquist has testified in a previous trial of the above-entitled action that you as his agent, located the claim known as No. 32 Above Allen's Discovery on the Kougarok River on the 10th day of January, 1902. I will ask you whether or not you ever located said claim for the said N. O. Windquist at said time or at any other time or if you ever located any claim for the said Windquist on said river or ever, after said claim was located by you for any other person, *cause* said location notice

(Deposition of N. Methe.)

to be changed and the name of said Windquist substituted for that of the original locator?

A. No. [61—33]

Q. Did you ever have any conversation with J. C. Kennedy with reference to said claim No. 32 Above Allen's Discovery on the Kougarok River in the presence of N. O. Windquist? A. No.

Q. Where did Heinze, for whom you have stated you located No. 32 Above Allen's Discovery, live at the time you made said location?

A. I don't know.

Q. What if anything do you know about the Kshunti Fraction on the Kougarok River?

A. Ames told me he staked it.

Q. State any other fact within your knowledge affecting the location of said No. 32 Above Allen's Discovery on the Kougarok River?

A. I know nothing else more than I have stated.

Cross-interrogatories and Answers.

Q. State when you first went to the Kougarok Recording Precinct. A. Spring of 1901.

Q. State whether or not you were upon the premises now known as No. 32 Above Allen's Discovery on the Kougarok River, Kougarok Recording Precinct, Alaska, before January 1st, 1902, and if so, state the date and who, if anyone, was with you upon said premises.

A. Do you remember that I was there before 1902.

Q. If you state that in January, 1902, you located a mining claim known as No. 32 Above Allen's Discovery on the Kougarok River, give the full name of

(Deposition of N. Methe.)

the person for whom you located said claim and the day of the month when the same was located? What hour of the day you made such location and who assisted you, if any one, in making such location. [62—34]

A. Heinze on or about January 10th, 1902, in the afternoon. Thomas Evans helped me.

Q. How many persons were with you when you located said claim and how many claims did you and your party locate that day?

A. I cannot remember any one but Evans nor the number of claims we staked.

Q. If in answer to the last interrogatory you state that yourself, T. H. Evans, L. A. Peel and A. C. Armstrong located several claims that day, please state the manner of location of each of these claims.

A. I don't remember this Peel, but Evans and Armstrong and myself staked quite a few claims.

Q. Did you and the said Evans, Peel and Armstrong not locate eight or ten claims on that day by one of the party taking a center line, one of the party taking the east side line and one of the party taking the west side line, and walk up the river, placing stakes at what you considered every 1320 feet, and was that not all you did in locating those claims? If not, what else did you do on that day?

A. I can't recall the manner in which we staked the rest of the ground.

Q. State as near as you can remember the hour of the day you located No. 32 Above Allen's Discov-

(Deposition of N. Methe.)

ery, and who, if anyone, assisted you in making such location.

A. Some time in the afternoon, Thos. Evans helped me.

Q. How many stakes did you set or cause to be set at each corner of the location?

A. One initial stake and one on each corner.

Q. State whether or not at the time of making such location there was much or little snow on the ground.

A. There was quite a lot of snow in some places.

Q. Is it not a fact that on that day the weather was extremely [63—35] cold?

A. It was cold.

Q. Describe the stakes used by you in locating No. 32 Above Allen's Discovery. Were they not willows? If so, state the size and length of the stakes and whether these stakes were placed into the ground or simply placed in the snow.

A. Willow stakes, the longest we could get in the Kougarok. Part in ground and part in snow.

Q. State whether or not you placed a center end stake on the south boundary of said claim adjoining the north center end stake of No. 31 Above Allen's Discovery, or whether one stake designated the upper center end of No. 31 Above Allen's Discovery and the lower center end of No. 32 Above Allen's Discovery.

A. No. 32 was staked adjoining No. 31.

Q. Likewise state whether or not you placed a stake adjoining the northwest corner of No. 31

(Deposition of N. Methe.)

Above Allen's Discovery to designate the southwest corner of No. 32 Above Allen's Discovery.

A. Refer to map.

Q. State whether or not there were two stakes placed by you at the northeast corner of No. 31 Above Allen's Discovery, and one of these stakes being marked southeast corner of No. 32 Above Allen's Discovery. A. Refer to map.

Q. State whether or not No. 32 Above Allen's Discovery as located by you followed the course of the Kougarok River, or whether it extended so as to cover the left limit of said river.

A. It didn't follow exactly the course of the river, but it covered most part of the left limit.

Q. Is it not a fact that you never completed the location of No. 32 Above Allen's Discovery on the Kougarok River, but only set two stakes? [64—36]

A. No. 32 was staked with five stakes as well as I can remember.

Q. Is it not a fact that at the time you located those claims you were working in the employ of Captain J. C. Kennedy, and located those claims at his request, and were supposed to locate the same for such persons as he might designate?

A. I was working for Captain Kennedy but I had a perfect right to stake for whoever I wished and I staked that claim for Heinze.

Q. Did you or Heinze, to your knowledge, ever reset the stakes placed by you on No. 32 Above Discovery? If so, when?

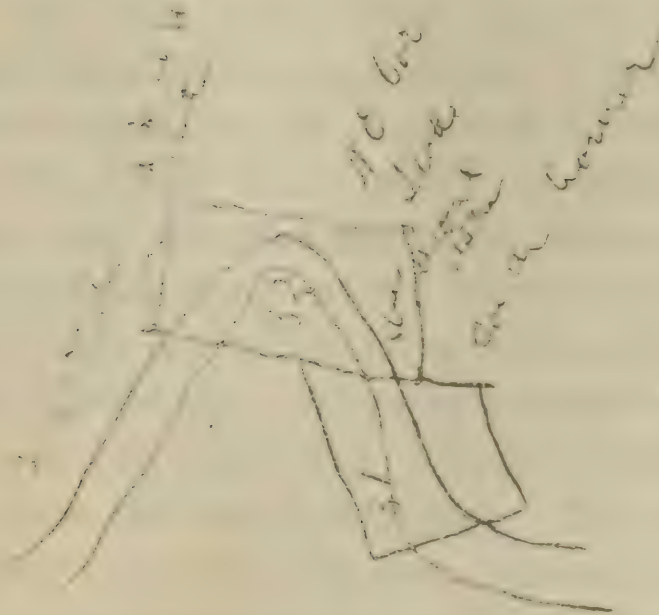
A. No, I had nothing more to do with it.

(Testimony closed.)

Map attached to deposition of N. Methe was offered and admitted in evidence and marked "Defendant's Exhibit 1" as follows: [65—37]

(DEFENDANT'S EXHIBIT 1)

T T A F



[Testimony of T. H. Evans, for Defendant.]

T. H. EVANS, a witness produced on behalf of the defendants, being duly sworn testified as follows:

My name is T. H. Evans. I am the T. H. Evans who has been mentioned as a witness to the location. I have lived in Alaska since 1898 and in the Kougarok Precinct since 1900. In the summer and fall of 1901 I was on Macklin Creek and along the Kougarok River. Macklin Creek is about two miles above No. 32. There were a number of persons with me, among them was N. Methe whose deposition has just been read. Also Joe Sales, Jack Blocker and Tom Rhules and others. I was prospecting for myself on the Kougarok River from above Macklin Creek to the mouth of Homestake. Homestake runs into the Kougarok River above eleven claims from No. 32 Above Allen's Discovery. I prospected that part of the river between Macklin Creek and Homestake. We prospected just as any one would at any place that looked favorable all along the river for four or five days. That was in August. The water was very low. We were trying to see if we could find anything worth locating. We supposed the ground along around Macklin Creek and Homestake had been previously located. I didn't [67—38] know by the records but there were old stakes all along, stakes of 1899. We figured these locations would run out by January, 1902. I believe that we prospected on the ground which was afterwards located as No. 32 Above Allen's Dis-

(Testimony of T. H. Evans.)

covery. We found colors of gold. I spent the winter of 1901-1902, that is the fore part of the winter on the trail, most of the winter on Macklin Creek. N. Methe and I were prospecting together. On January 10th, 1902, we were staking some claims. We commenced to stake at No. 19 Above Allen's Discovery, I believe Armstrong and Methe were with me. We staked up to No. 32 Above Allen's Discovery including No. 32 and also No. 19. We did not include No. 8. N. Methe staked No. 32 Above Allen's Discovery on the 10th day of January, 1902. I assisted in making the location. Mr. Armstrong was there but whether he saw the location I do not remember. He was with us that day. I had a conversation with Methe with reference to whom he was going to stake No. 32 for. We staked No. 31 for L. A. Peel. I asked John Moberg who he wanted to stake a claim for and he said "Stake one for L. A. Peel." He authorized me to sign his name as agent for that location. After I staked No. 31 Methe said he would stake No. 32 for a friend of his called Heinze. I didn't know who Heinze was. I assisted him in staking No. 32. Methe placed the initial stake as near as I can remember close to the edge of the river, at the upper center end of No. 31, if there was an upper center end of No. 31. I don't remember whether we completed staking that night or not but there were six stakes, four corners and center and lower end. As well as I can remember we placed the lower center stake of No. 32 butting right on to No. 31. I believe that the initial stake of No.

(Testimony of T. H. Evans.)

32 and the upper center end stake of No. 31 were together. They were willow stakes. In locating No. 32 we put down two corner stakes at the lower end and walked up on our way home and put up the upper center stake and along about the 14th [68—38½] of January, we completed staking, that is Methe finished the work while I was staking No. 8. That night that we staked No. 32 we put a notice on a stake and afterwards Methe wrote out another notice and completed his location when he fixed up his stakes on or about the 14th of January. He wrote out a new notice and placed it upon the stake by slitting the stake and sticking the notice in the slit. He prepared the notice at home where we were living then on Macklin Creek. I witnessed the notice. Heinze was mentioned in the notice as the locator and Methe as agent. That is the Methe whose deposition has just been read. I signed that location notice as a witness. About the 14th the location notice was placed upon the claim. I never witnessed any location made by N. Methe in which Windquist was named as locator nor did I ever see such a notice. The first time I ever heard that Windquist claimed No. 32 was a couple of months afterwards when it got rumored around that the notice has been switched. I never had a conversation with Windquist such as he detailed on the stand in which I admitted to him that I had witnessed a location for him. I was on Homestake Creek most of the summer of 1902. The latter part of the summer right down at the mouth of the creek and the first

(Testimony of T. H. Evans.)

part of the summer up on No. 5. I know Gus Johnson who was on the stand. He was up on Homestake on the fourth of July. I don't know just when he got there. He worked a lay on No. 2 at the mouth of Homestake that summer. I was on Homestake in July and in June. I know where Captain Kennedy's cabin was. There were on the Kougarak River in the summer, the early summer of 1902, between Kennedy's cabin and No. 32, a number of people. There was Gallagher, and Kid Fisher at the mouth of Taylor Creek. There was quite a number of us on Homestake, Bobbie Brown, Jack Smith, Theodore Smith, Gunder Sather, Gus Johnson, John Moberg, Billie Benty, John Ellingston, Jule Gunder-son and F. A. Chase. I heard Windquist testify that [69—39] he was up there in June or July and that he went to No. 32 Above. In going from Captain Kennedy's cabin to No. 32 Above he would pass Homestake and the mouth of Taylor Creek. I don't think that at that time any one would have tried to go by without seeing anybody. He would have met some one. Visitors were not frequent up there in that part of the country. It was quite an event when anyone did come up. If Windquist had been up there and visited Kennedy that summer and worked on No. 32 in June or July, unless he took pains to conceal it, it would have been generally known. Some one would have spoken of it. I think we would have heard of it at least. I did not hear of it. The first time I ever heard he had ever been up there was in the courtroom on the first trial of

(Testimony of T. H. Evans.)

this action last year, anyway the first time this case was tried. That is the first time I ever heard he claimed to have been up there in the summer of 1902. I was present at the former trial of this case. I remember the occasion of the location notice, the original location notice, purporting to have been made for Windquist by Methe, was exhibited in court, the one having my name on as a witness. It was shown to me while I was sitting over there and while I was on the stand also I believe, and I testified whether or not that was my signature on the notice. I examined the signature of T. H. Evans on that notice. It was not my signature, of that I am positive. I have never had it in my possession since. I knew where Windquist's cabin was in 1902 at Kruzemapa and where Mary's Igloo is and Birch Hill and Checkers Town. It is about sixty miles from Windquist's cabin at Kruzemapa to Captain Kennedy's on the Kougarok, according to the route Windquist detailed he travelled, and from Captain Kennedy's cabin to No. 32 was somewhere in the neighborhood of five miles. The usual route in travelling from Mary's Igloo at that time was by way of Shelton, called Lane's Landing then, then across by Dahl and then striking the river again [70—40] below the mouth of Windy Creek and following the Kougarok River up. That route would not take in Checkers Town on the trip. It is forty miles from Checkers Town to Kennedy's cabin. The travelling is not good. There were quite a few camps along the river between Kennedy's cabin and Checkers Town.

(Testimony of T. H. Evans.)

Armstrong stopped at the mouth of California. Benty was mining at the mouth of Arctic Creek and Bert Glass had a roadhouse there. At the mouth of Arizona Creek Hurley, Lee Marshall and Charles Merritt were working. Jim Turner and Fred M. Boden were working around the mouth of the North Fork of the Kougarok near Two Bit Gulch on the right limit of the Kougarok River. Harry Wells and Chidester and Granhome were working at Dreamy Gulch. Dreamy Gulch is above Kennedy's cabin between Kennedy's cabin and No. 32. There was a roadhouse at the mouth of California Creek. From Checkers Town up the river I think a man would follow the river. It is forty miles from Checkers Town to Kennedy's cabin by the shortest route, a great deal farther by following the river. Ordinarily I would want about six days at least to make the trip from Windquist's cabin at Kruzemapa by boat to Mary's Igloo then up to Birch Hill then from Birch Hill to Checkers Town and then up the river to No. 32 Above Allen's Discovery. I know Gus Johnson who was on the stand. He was up there in 1902 working at Homestake Creek. I saw him pretty frequently. He never said anything to me about prospecting on No. 32. I never knew of his doing that. I believe he did very well on Homestake for a while. I don't remember where Johnson was in 1903. I found the name of Windquist written on the lower end stake of No. 8. I asked Gus Johnson about it in 1903 and he said that he was looking for No. 32 and he thought that this lower center stake

(Testimony of T. H. Evans.)

marked "Witness" was "Windquist." No. 8 is just above No. 32. It was in 1903 that I found this name "Windquist" written on the lower end stake of No. 8. When I spoke to Johnson about writing the name on the stake he told me [71—41] he could not find any stakes for No. 32 and saw "Witness" on there and thought it must be "Windquist." He did not say anything about being the agent for Windquist with authority to look after his claim. I do not know whether he afterwards found No. 32 Above that summer or not. It was during the summer he told me he had not been able to find the stakes of No. 32. That was in 1903 I think. I don't know what work, if any, he did, on No. 32 in 1903. I know that Johnson was working there at different times but I don't know what he did or how long he stayed or anything like that or what years.

Cross-examination.

I saw Gus Johnson working there in different years. I helped him do the assessment work on the claim myself in 1907 for Windquist, that is on No. 31 but not on No. 32. I never helped him do the work on No. 32 for N. O. Windquist I am sure of that. I helped him dig a hole or two on No. 31. I didn't know who he was doing the work for, I don't know who owns No. 31 now. I think Sather and Johnson own it yet, I am not positive. Johnson and I exchanged work that same year. I did not exchange work for him on No. 32 for N. O. Windquist. I have no interest whatever in this litigation. I own a claim adjoining No. 32, I own No. 8. I suppose it

(Testimony of T. H. Evans.)

joins that piece of ground. (Witness indicates on map where No. 8 joins No. 32) No. 8 butts on to the line of No. 32 for the whole of the entire end line of No. 8 according to this map, plaintiff's exhibit "A." I have been mining on the lower end of No. 8 close to the line. Not an inch over the line. I have done underground mining on No. 8 and according to the map I probably did mine over on to No. 32 but not as No. 8 really is. According to your map probably I did. I took some gold out of it, yes, sir. I did not know the man Heinze at all and could not tell you his first name. I saw Heinze that lived at the mouth of Sinnock. All I know about this location notice of No. 32 is that it was made out in the name of [72—42] Heinze. I don't remember the initials, I know it was staked for Heinze. I don't know whether it said just "Heinze," it might have been any old initial but it was staked for Heinze. I saw the name of T. H. Evans signed to the location notice the one that was recorded in 1902. That was not my signature upon it. It was not like it. I first went to the Kougarok River in 1900. I was not working for Captain Kennedy then. I worked for Kennedy in the early part of the winter of 1901 and off and on all winter until the spring of 1902. I did not work for Captain Kennedy in the summer of 1901. I was prospecting along the Kougarok River in 1901 with N. Methe. No I did not find gold every place I prospected. We were panning up and down the river for four or five days. Might have met somebody but don't remember. We first

(Testimony of T. H. Evans.)

started prospecting from Macklin Creek. It is below Connelly's Discovery, then prospected down the river as far as the mouth of Homestake a distance of about four miles. I remember some of the places where we prospected. I don't remember the exact place on No. 32. I believe we prospected on No. 32. As well as I can remember I believe that we did. I could not tell you the exact places. To the best of my remembrance and knowledge I will swear to this Court and jury that I and N. Methe prospected within the exterior boundaries of No. 32 and that we found colors on No. 32 Above in 1901 along those bends of the river there. I say that to the best of my knowledge I did so. To the best of my remembrance we panned around those bends where No. 32 is now. We were together at times when we were doing this prospecting. We probably were a few feet apart at times and other times together. We were not very far apart, Methe and I, when we prospected on the bends of the river crossing No. 32. I was merely a witness to the location of No. 32 Above Allen's Discovery. The Heinze location I am referring to. It was located by us on the 10th of January, 1902. We located that day [73—43] from No. 19 to No. 32, eleven claims, Methe and I and Armstrong. Thirteen claims I should say. Yes, we located thirteen claims that day. The weather was pretty cold and the ground was frozen and the snow wasn't very deep. In some places it was eight or ten inches deep, in other places there wasn't any and in other places it might have been a couple of

(Testimony of T. H. Evans.)

feet deep. We had with us when we made those locations a little axe and a jackknife. The axe was just a small axe to cut willows with and we cut our willow stakes as we went along to stake the claims with. We usually cut a bunch of stakes when we came to a good willow patch and carried them along with us when we needed them. All these claims had six stakes of some kind. Some were not very large. We didn't pretend to stick them down in the frozen ground, just stuck them in the snow. I think we started out and were on the road before daylight that day. It was early morning, and I suppose it must have been around eight o'clock somewhere when we staked Number Nineteen. It might have been earlier or later. It wasn't very dark at ten o'clock in January. We probably finished staking at half past three or four o'clock. It wasn't very dark at that time. We commenced locating before it was thoroughly daylight and continued after it was dark. We put in a pretty good shift. Armstrong and Methe were with me when we located this string of claims. I went up one side of the river, I don't remember as I followed any particular side. We would go to a place, cut stakes, then probably switch back and forward around. If I remember rightly I followed mostly the right limit. Methe took the center of the claims and stepped them off and the others of us took the other side of the river. We just stuck those stakes, marking each claim, in the snow. We put some kind of a location notice on all of them. Some written on the stakes, some no-

(Testimony of T. H. Evans.)

tices that the boys had made out, and blanks ready to be filled in. I didn't see that writing on all the claims. I didn't go over to see what he was writing. I saw him from about three hundred to three hundred and thirty feet away, or somewhere in that neighborhood. I think as near as I can remember there were about eight claims that we put location notices on. I can't recollect the names of these eight claims, I remember some of them. We put a location notice on the stake of No. 32. If I remember right we had one of those forms and Methe scribbled out a location notice and he intended to put another one in its place, and put it on a stake, but I would not be positive. But the location was right on the stake, the initial stake I mean of No. 32. This stake had written on it the date of the location, I suppose, and the locator and witnesses. We finished staking No. 32 about three or four o'clock in the evening and the sun was getting pretty low then. The location notice was written on the stake about three or four o'clock on a very cold day when we had to wear gloves. I tell this jury that at that time I assisted in writing a location notice on a willow stake at that hour of the day and put it in the ground as initial stake of No. 32 [73½—43½]

We probably finished staking at half past three or four o'clock and commenced after eight o'clock in the morning. We marked the stakes of the various claims we located that day, the stakes were blazed, those that we wanted to write on. We didn't write the name of the claim on the stakes, simply the num-

(Testimony of T. H. Evans.)

bers, 1, 2, 3 and 4. The initial stakes all had "Initial stake." We wrote on the initial stakes initial stake of so and so. In February, 1902, it was rumored around that Windquist claimed No. 32 by reason of its having been located for him and since that time I have known that he claimed to be the owner of No. 32. I am friendly with Mr. Ames the defendant in this action. Have known Mr. Ames since 1903. I did not see Mr. Windquist when he went up to claim No. 32 in 1902 in June or July and for that reason do not think he went up there. Yes I think I saw everybody who was up there in 1902. That is twelve years ago, yes, sir. I wintered on Macklin Creek in 1911. I was down here in the month of October, 1911. I knew at that time there was to be a litigation over No. 32. I knew Mr. Ames was taking out a dump and Windquist was going to stop him. I believe that is all I heard about it. I did write up to Mr. Ames about the matter from Nome. Mr. Ames wrote down and asked me to see Mr. Grigsby and try to avoid any trouble to try and get it settled in some way and not to start anything. I wrote a letter to Mr. Ames. I did not keep a copy of it. I know the Kshunti Fraction, heard of it a few days after it was staked. At that time I heard that Mr. Ames was claiming all the ground between claim No. 31 and No. 8. I do not remember writing any such thing to Mr. Ames as that it would be much easier to fix a fraction [74—44] between No. 32 and No. 8 than to hold all the ground lying between No. 31 and No. 8. I don't remember writing anything and

(Testimony of T. H. Evans.)

wording it that way. I didn't intend to at least and never did.

Q. Examine the instrument I hand you and state whether it is a copy of a letter you wrote to Mr. Ames.

A. I don't remember of writing anything and wording it in that way. I didn't intend to at least and never did.

I know Mike Campbell who sits over there. He never showed me any letter like that at any time. If I talked about it with him I told him I wrote a letter to Mr. Ames. I don't remember ever writing a letter worded in that way. If I did I never intended it. I don't remember anything of the kind. I don't remember ever having written such a thing. Yes, I have been bothered a good deal with this litigation, not entirely on behalf of Mr. Ames. I have been helping him out. I suppose everything I done in relation to the case was in acting for him. I know Jerry Sullivan the plaintiff. I don't know where I was May, 1912. I might have discussed the case with Jerry Sullivan on No. 9 Above Connelly's Discovery in May, 1912. I made a trip or two up there to see Jerry but I don't remember for what purpose. I don't recall going up to No. 9 during that period, that is the month of May, to see Jerry Sullivan. I had a quarter interest in No. 6 Below Connelley's Discovery, yes, sir. Some two or three times I tried to deal with Jerry on that ground. I don't remember having a conversation with Jerry Sullivan in the month of May, 1912, on No. 9 Above

(Testimony of T. H. Evans.)

Connelly's Discovery to the effect that I wanted to sell him No. 6 Below so I could obtain money to come down to attend court on the hearing of the injunction in this case. I might have told him a hard luck story of some kind in a joshing way but I [75—45] certainly didn't mean it in that way. I was brought down for the hearing on the injunction. I don't remember having a conversation with Jerry Sullivan at that time in which I stated that I wanted to sell my interest in No. 6 in order to obtain money to come down to Nome to try and prevent this injunction and that while Windquist owned the claim Captain Kennedy was dead, Armstrong and Methe out of the country, that us fellows in the Kouragok would have to stick together and let no strangers in on it, I don't remember anything of the kind. I don't think it ever occurred. I don't remember stating at that time that I thought six hundred feet of No. 32, being the amount outside of the Kshunti Fraction, was enough for Mr. Windquist for what he had done on the claim, but I have tried to discourage a lawsuit between both of them. I didn't want to be dragged down here. I do not remember any such conversation. I never said anything to the effect that I was interested in this litigation to the extent that I had drifted over the line of No. 8 and had to protect myself personally in this matter, or words to that effect.

Redirect Examination.

My purpose in writing to Mr. Ames was to try and settle this controversy between Windquist and Ames without a lawsuit. I tried to discourage both parties

(Testimony of T. H. Evans.)

as much as possible. I don't think I ever tried to encourage a lawsuit between them. That map, exhibit "A," does not correctly show No. 32 as I located it. As we located No. 32 originally it did not join on to No. 8 the way it does on that map.

Recross-examination.

The location notice of this claim as we filed it is just from staking in the snow. Our intention when locating it was to take in the bend of the river and up the gulch and down to No. 31.

(Witness excused.) [76—46]

[Testimony of H. C. Ames, the Defendant, in His Own Behalf.]

And thereupon Mr. H. C. AMES, the defendant, was called as a witness on his own behalf and after being duly sworn testified as follows:

My name is H. C. Ames. I am the defendant in this action. I have lived in the Kouragok since 1900 and have known the ground in controversy since 1903. The date of the location of the Kshunti Fraction was July 25th, 1903. It was located in the name of George McLean. I made the location assisted by Ed Moran, Alex Armstrong, Jack Blocker and Joe Sales. I have noticed that map, exhibit "A," on the wall. I put my initial stake there on this corner (indicating) and put stake No. 1 about there (indicating) and corner No. 2 up here some place (indicating), it does not show on this map and I put one stake over there (indicating); the line ran along down the side of No. 8. The ground in controversy is approximately correctly shown on that map, the conflict

(Testimony of H. C. Ames.)

between the Kshunti Fraction and No. 32, but my claim extends on farther up. I did, prior to staking the claim, prospect on the ground contained within the exterior boundaries and discovered colors of gold in several places upon the claim. At the time I located the claim I did not see any stakes of No. 32. I had been all over the claim a week or so before that and was camped right close there. I did not see any stakes of No. 32 as shown on map exhibit "A" at the upper corners. If there had been any there I would have seen them. I saw stakes marked No. 32 in 1904 for the first time, about the middle of where No. 31 used to be. They were about there I should judge (indicating). They were stakes put up in 1904. (Witness points at the place marked "A" on the map or initial stake of No. 32.) I don't know who put it up. I had only gossip knowledge about it. There were no other stakes of No. 32 put up at any point in the conflict area in 1904. If there had been I would have known it. At the time I located my claim I saw stakes of No. 31 [77—47] the lower stakes and one upper stake and the lower initial stake. The lower initial was about 1400 feet from my initial stake, the initial stake of No. 31 I mean, down-stream from my claim. The upper corner of No. 31 was at my initial stake. My initial stake was at the point marked on the map as corner of No. 8. My initial stake was never at any other place and in 1903 when I located the claim I found a stake of No. 31 Above Allen's Discovery at that point. I do not know who put it there. I posted a notice of location

(Testimony of H. C. Ames.)

at the time I made the location and caused the same to be recorded. (Witness is handed a paper.) This is a copy of it; yes, sir.

Paper is offered and admitted in evidence and marked "Defendant's Exhibit 2," and read to the jury, as follows:

Defendant's Exhibit No. 2 [Notice of Placer Location.]

Copy page 132, Vol. 49.

NOTICE OF PLACER LOCATION.

The undersigned is a citizen of the United States, has discovered placer gold in the ground hereinafter described and hereby claimed for placer mining purposes; about 18 acres situated on Kougarok River, Kougarok Mining District, District of Alaska, to be known as Kshunti Fraction and described as follows:

Commencing at an initial stake which is about 150 yards in a westerly directon from Kougarok River and about two miles below the mouth of Macklin Creek, running thence 660 feet in *a* easterly direction to Stake No. 1; thence 1200 feet in a northerly direction to Stake No. 2; thence 600 feet in a westerly direction to Stake No. 3; thence 1200 feet in a southerly direction to initial stake.

All said stakes are made of —— and each is marked with its number, [78—48] direction of corner and name of claim. Adjoining claims are No. 8 below Conley's discovery on the Kougarok River and No. 31 Above Allen's Discovery on the Kougarok River. A copy of this notice is posted on the initial stake.

This location is made on this Twenty-fifth day of July, A. D. 1903.

G. J. McLEAN,
Locator.
H. C. AMES,
Agent.

ED. MORAN,
Witness.

Recorded 5 P. M., Oct. 24, 1908.

LARS GUNDERSON, Jr.,
Recorder.
By Carrie G. Lokke,
Deputy.

District of Alaska,
Second Division,
Kougarok Precinct,—ss.

This is to certify that Frank H. Thomas, U. S. Commissioner and ex-officio recorder in and for the Kougarok Precinct, in the Second Division, of the District of Alaska, has compared the within and foregoing copy of a placer location notice, with an instrument as the same appears of record in Volume 49, page 132 of the records of the said precinct and that the within and foregoing is a true and correct transcript of said record and of the whole thereof.

Witness my hand and the seal of this office, this 5 day of April, 1913.

[Seal] FRANK H. THOMAS,
U. S. Commissioner and Ex-officio Recorder. [79—
49]

I know where claim No. 31 is now. The upper corner of No. 31 is about here (designating the S.W.

corner of No. 32 as shown on the map). My stake was never down that far. Yes, I did claim ground south of the line running from the corner of No. 8 over to the point marked "A" on the map in my location. I have a deed. I used willow stakes in locating the claim except the initial stake which was a plain box stake. The stakes were marked initial stake and Nos. 1, 2 and 3. The initial stake was marked initial stake and date. The notice was posted at the initial stake. I have the deed in my possession. (Witness produces deed, deed admitted in evidence, marked Defendant's Exhibit 3, as follows:

Defendant's Exhibit No. 3 [Deed].

(Transcript of Record, No. 7,084, page 98, Vol. 53, Records of Kougarok Recording Dist.)

THIS INDENTURE, made the 24th day of March, in the year of our Lord one thousand nine hundred and five BETWEEN F. G. Doolittle, G. H. Smith of Seattle, Washington, by their attorney in fact Geo. J. McLean and George J. McLean of Igloo, Alaska, the parties of the first part, and H. C. Ames of Igloo, Alaska, the party of the second part,

WITNESSETH: That the said parties of the first part, for and in consideration of the sum of one (\$1.00) Dollar, Gold Coin of the United States of America, to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and forever quitclaimed and by these presents does grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part, and to his heirs and assigns all of their right, title and interest in and to No. 27 Above Allen's Discovery on

Kougarok River, all of No. 30 Above Allen's Discovery on Kougarok River, one-sixteenth interest in the Mahabarata Assn. Claim on Stevens Gulch, a tributary of Macklin Creek, one-half interest in the Kshunti Fraction on Kougarok River, said claims being located by parties of the first part, and recorded in the records of the Kougarok Recording Dist., to which said records reference is hereby made for a more particular description.

TOGETHER with all the tenements, hereditaments, appurtenances, rights and privileges thereunto belonging or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in or to the said premises and every part and parcel thereof, with the appurtenances. [80—50]

TO HAVE AND TO HOLD, all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, and to his heirs and assigns forever.

IN WITNESS WHEREOF the said parties of the first part have hereunto set their hands and seals the day and year first above written.

F. H. DOOLITTLE. (Seal)

G. H. SMITH. (Seal)

By their Attorney in Fact,

GEO. J. McLEAN. (Seal)

GEO. J. McLEAN. (Seal)

Signed, sealed and delivered in the presence of:

LARS GUNDERSON.

WILL JOHNSON.

United States of America,
District of Alaska,—ss.

On this 24th day of March, A. D. One Thousand Nine Hundred and Five, personally came before me Carrie G. Lokke, a Notary Public in and for said District, the within-named Geo. J. McLean to me personally known to be the identical person described within and who executed the within instrument and acknowledged to me that he executed the same freely, for the uses and purposes therein mentioned. Also known to me to be the person who subscribed the names of F. G. Doolittle and G. H. Smith to the within instrument as attorney in fact and he acknowledged to me that he subscribed the names of said F. A. Doolittle and G. H. Smith as principals and his own name as attorney in fact.

WITNESS my hand and seal this 24th day of March, 1905.

[Notarial Seal]

C. G. LOKKE,

Notary Public in and for the District of Alaska.

Filed for Record 10 A. M., March 25th, 1805. Lars Gunderson, Jr., Recorder. By Carrie G. Lokke, Deputy.

District of Alaska,
Second Division,
Kougarok Precinct,—ss.

This is to certify that I, Frank H. Thomas, U. S. Commissioner and Ex-officio Recorder in and for the Kougarok Precinct, in the Second Division of the District of Alaska, have compared the within and foregoing copy of a Deed, with an instrument as the

(Testimony of H. C. Ames.)

same appears of record in Vol. 53, page 98, of the records of the said Precinct, and that the within and foregoing is a true and correct Transcript of said record, and of the whole thereof.

Witness my hand and the seal of this office this 5, day of April, 1913.

[Seal]

F. H. THOMAS,

U. S. Commissioner and Ex-officio Recorder. [81—51]

In 1903 I did a little prospecting on the Kshunti Fraction. In 1904 I dug part of the gulch out that shows on that map, tried to work that down to get a bedrock drain and sank some other holes along the creek on the bars. I did one hundred dollars' worth of work. A whole lot more than one hundred dollars' worth. I wasn't confining myself to assessment work. Since 1904 I have performed the annual labor on the Kshunti Fraction and have done from two to six hundred dollars' worth of work every year since. I have sank more than twenty odd holes to bedrock, twenty-seven I think it was, besides drifting. It is frozen ground and used a windlass in sinking. Neither Windquist nor his agent has ever done any work on the Kshunti Fraction except in 1911, and then it was done on an agreement I had with Gus Johnson. They did their work in 1911 about three hundred feet above the lower line of the Kshunti Fraction as shown on that map exhibit "A." That was the point referred to by Johnson when he said I removed him from the claim. The work he did on the Kshunti Fraction in 1911 was at

(Testimony of H. C. Ames.)

the same point. I permitted him to work there on an agreement that he and I had,—the agreement was to settle the line, the dispute of the line between his claim and mine. He said he had the power from Windquist. He agreed to settle the line at that time and we did establish a line. I can show it on the map there. (Witness draws a line across the map indicating the line agreed upon.) I said to Johnson, “If you will settle this without any trouble I will give you that much of my claim” and he said, “Well, there would not be much left” I said, “It is only a difference of this corner and it is not much” and he said, “We will do that” and I said, “We will sink holes together next year with a boiler” and he agreed to do it the next year. That was assessment work he was doing, I had my assessment work all done. Yes, sir, we made that agreement with reference to his work. The holes that he [82—52] sank there that year were about on the line that I just drew, the line we established as the line between his claim and mine. The agreement was that the next year, I had a boiler and prospecting outfit, and I would furnish them and we would go in together and finish the hole. He dug the dirt out down to the frost, about three feet deep. It was about twelve or fifteen feet to bed-rock. That was to be the assessment work on both claims for the next year if done in that manner, if we did it the next year.

Mr. COCKRAN.—I want to move at this time to strike out all the evidence to this agreement because the same has not been coupled up or shown to have been made, if made at all, with any authority from

the owner of the claim.

(Argument.)

Mr. COCHRAN.—I am attempting to show the evidence offered by this witness is immaterial unless you can couple it up with proper authority from the owner of the ground, Mr. Windquist.

Mr. GRIGSBY.—If the Court please we are endeavoring to show exclusive possession of this ground ever since its location in 1903 and this witness has testified that nobody else has worked on the Kshunti Fraction in any year since the location of it except 1911 and he only permitted the work to be done that year on account of an agreement made by him and the agent of Windquist to establish a boundary line. It is admissible whether or not it was binding on Windquist to show whether or not he suffered an agent or any owner of a conflicting location to work on his ground whether for the purpose designated by Mr. Cochran it is admissible or not. I think it is admissible for that purpose because Windquist has testified he gave Johnson complete [83—53] authority to do what he pleased with his claim. Johnson thereafter was his agent every year, did all the work that was done on the claim, Windquist never went with him. He could mine it, take anything out he could and do as he pleased with it generally and under that authority, up there miles from where Windquist was, when a dispute arose he goes out and establishes a boundary line on the ground which is not a contract with reference to real estate that has to be done in writing. It is for the jury to say whether it is proof of the estab-

(Testimony of H. C. Ames.)

lishment of a boundary line or not. It is offered to show why he permitted Johnson to work on his fraction.

Mr. COCHRAN.—But the motion is to strike this out at this time because this agreement testified to by this witness has no binding force. We move to strike it out unless you tell the Court you will couple it up with authority recognized by Windquist or in writing. My motion should prevail at this time and the evidence in relation to any agreement establishing a line between the two claims should be stricken out at this time.

(Argument.)

The COURT.—I will have to rule out the evidence.

To which ruling the defendant then and there excepted and an exception allowed.

WITNESS.—(Continuing.) Johnson at that time agreed to the establishment of that line.

Q. What did Johnson say to this proposition when you made it to him?

Mr. REED.—Objected to as not binding on the plaintiff [84—54] or plaintiff's grantors unless the authority be in writing.

The COURT.—Objection sustained.

To which ruling the defendant then and there excepted and exception allowed.

WITNESS.—(Continuing.)

After Johnson did this work in 1911 I did not do any work on the Kshunti Fraction in connection with Johnson. Sank no holes with him. In 1912 Johnson attempted to do some work on the Kshunti

(Testimony of H. C. Ames.)

Fraction at the same point. A man named Broste was with him. It was in October they were up there awhile one day and came back the next day. Came from Brost's cabin a mile and a half down the river. My cabin is a little ways southeast of the Kshunti Fraction. Coming from Broste's cabin they had to pass my cabin within a couple hundred feet. I had a conversation with them when they came up the second day. I went out and asked Mr. Broste to come over to the house, that I wanted to talk to Johnson privately. He came over to the house and I, after he came in the house, went out and I had a lock on the outside of the door and I snapped the lock so as to be sure he would not come out. I had ordered them off the day before and they would not go. I thought one man was better to put off than two, that is the reason I locked him in the house and I went over there and drove Cayuse Johnson off the claim. I did not tell him at that time that I was going to have that claim if I had to kill everybody in the Kougarok. I drove him off the Kshunti Fraction. I did not at that time assert any title to the rest of that No. 32 as shown on that map, nor put anybody off from there. I never have tried to prevent their doing work on the balance of No. 32.

Mr. GRIGSBY.—Now, we will again offer the matter stricken out, if the Court please. We offer to prove the establishment [85—55] of a boundary line in the summer of 1911 between the witness and Gus Johnson as agent for Windquist, on the proof of agency already in evidence and as a full

(Testimony of H. C. Ames.)

establishment of a boundary line between those claims.

Mr. COCHRAN.—Objected to as being incompetent and not binding upon the plaintiff or his grantors.

The COURT.—Objection sustained.

To which ruling the defendant then and there excepted and exception allowed.

WITNESS.—(Continuing.) In the summer of 1902 I was at Mary's Igloo freighting on the river between Mary's Igloo, Shelton, Checkers Town and Turner. I was freighting with a scow and horse. Used a horse with a tow line, one man rode the horse and the other man rowed the boat, that was my occupation. Going from Mary's Igloo to Shelton I would go up and back the same day. Going to Checkers Town would go up one day and back the next. Was making trips nearly every day in June and July. I knew N. O. Windquist at that time, knew where he was living. Heard his testimony in reference to going from his cabin around to Mary's Igloo in a boat. I knew his boat. I knew the nature of the current between those points at that time. Part of the way it was quite a strong current between his cabin and Mary's Igloo. From Mary's Igloo to Birch Hill, you can go to Birch Hill and drift down to Mary's Igloo without rowing in an hour. It is five miles from Mary's Igloo to Birch Hill. It was not considered practicable to row up the river by anybody between those points. It was customary to tow with a line or pull it. It is the

(Testimony of H. C. Ames.)

way everybody went up the river. In freighting up and down the river we were on the right limit, Birch Hill is on the right limit. If there had been a boat left on the right limit during the time when he said he left his [86—56] boat there I undoubtedly would have seen it. I saw no boat on the river. It is seven or eight miles from Windquist's cabin around to Mary's Igloo the way a man would have to go rowing. Probably three or four miles in a straight line. It is five miles from Mary's Igloo to Birch Hill. It is six or seven miles in a straight line and probably ten miles by river from Birch Hill to Shelton. From Shelton to Checkers Town it is ten miles. It is one mile over Birch Hill. I don't think a man leaving Mary's Igloo going to Checkers Town would get there at all by rowing. The shortest way from Windquist's cabin to Mary's Igloo is walking. He would have to row himself across the river first, across the Kuzitrin. I was acquainted with the country between Checkers Town and Kennedy's camp in 1902. It was about forty miles from Checkers Town to Kennedy's camp where his cabin was in 1902. (Witness is handed a paper.) The paper I hold in my hand is a sketch of the Kougarok River and the Kuzitrin made by myself. It shows the course which Windquist said he travelled in making his trip. It shows it to the best of my ability in drawing it. It is taken from memory, from my memory and from travelling over the ground. It was made for the purpose of illustrating the route taken by Windquist approximately.

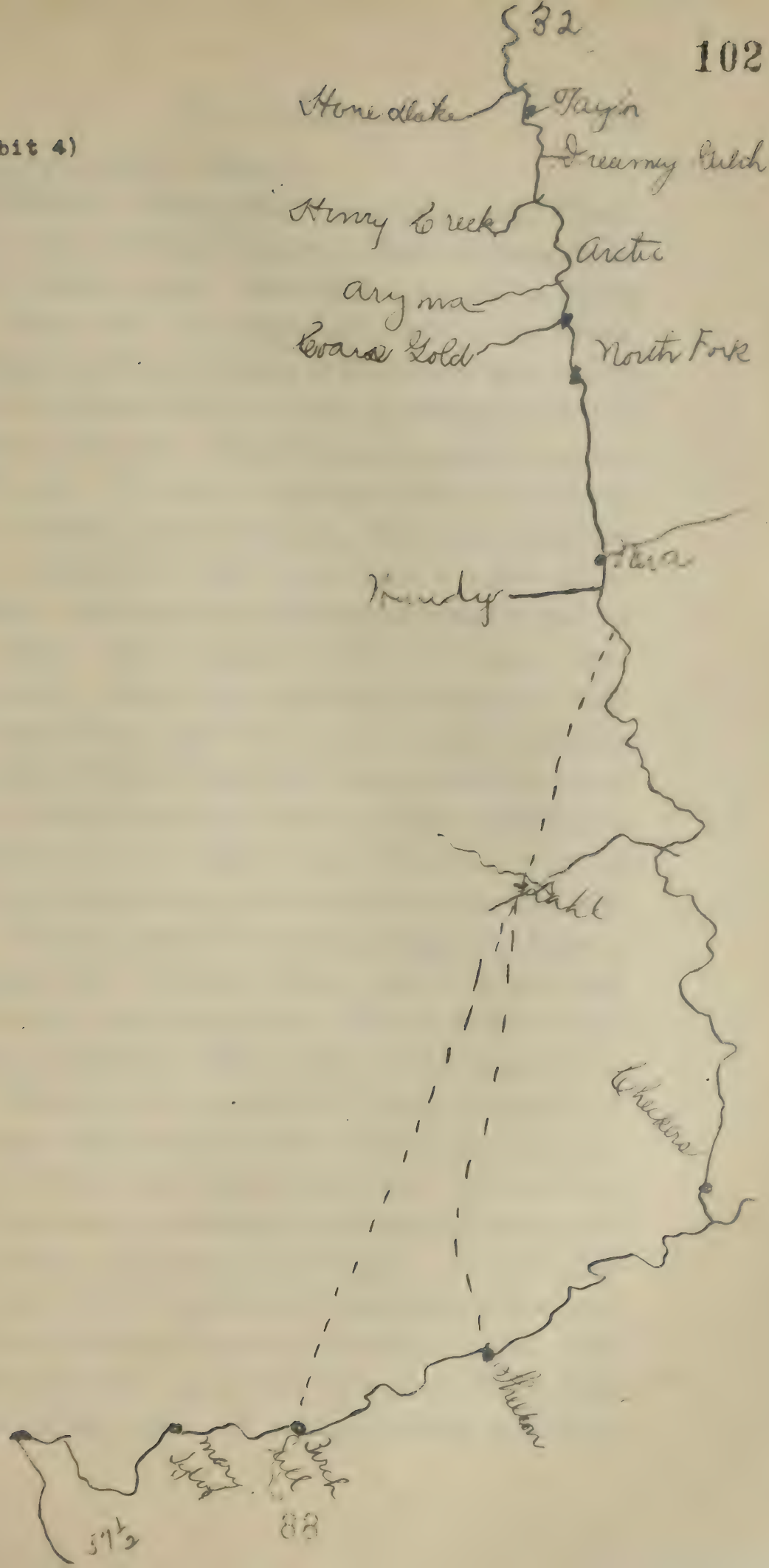
(Testimony of H. C. Ames.)

Whereupon the map was offered in evidence for the purpose of illustrating the testimony of the witness already given and further testimony.

WITNESS.—(Continuing.) This map shows the Kougarok River from Checkers Town to where Captain Kennedy's camp was and up Taylor Creek approximately. Also the Kuzitrin River from Mary's Igloo to Windquist's cabin to Checkers Town and Shelton.

Map offered in evidence for purpose of identification and marked "Defendant's Exhibit 4." [87—57]

endant's Exhibit 4)



(Testimony of H. C. Ames.)

WITNESS.—(Continuing, pointing out Windquist's cabin and Mary's Igloo.) That is a large bend in the Kuzitrin river. Birch Hill is five miles above there, Birch Hill lays right alongside of the river. In going from Mary's Igloo to Shelton a man would not go over Birch Hill, he would go alongside of it if he went on the trail. There is no necessity of going over the hill. If you were going to Dahl from Birch Hill you would go over the hill. The usual route for a man walking in 1902 from Mary's Igloo up to Kennedy's cabin and the Kougarok was by way of Birch Hill. They stopped there. I had a road house there. From Birch Hill they would go to Dahl Creek and from Dahl Creek over to the Kougarok River below Windy Creek and then up the Kougarok River. That is the way everybody was directed to go. Anybody who didn't know the road went as they were directed to go and that is the way the trail went. It was a little shorter to go that way than to go around by Checkers Town, not a great 'deal shorter but a far better road. Checkers Town lays in a bog or swamp. The nature of the country between Checkers Town and Neva Creek as shown on that map is all swamp and the river is very crooked. It is very long if one follows the river. If you don't follow the river it is swamps and lakes, hundreds of lakes in there, low ground and boggy. If a man followed the river it would take him four or five days to go from Checkers Town to Kennedy's cabin. The shortest and best way would be to go toward Dahl and cut off that flat. It is high ground as you go

(Testimony of H. C. Ames.)

toward Dahl and when you get up as far as about ten miles below Windy Creek the flat stops and it is mountainous, big mountains, that is what they call the Canyon up here, (indicating). The creeks that run into the Kougarok River when you go up the river from Checkers Town are Windy Creek here (indicating) and Neva Creek is the next one on the left limit. The Canyon starts in at the mouth of Windy Creek a little below; from that the North Fork is what you call the Canyon. The rest is high bluffs and hills all around the surrounding country. Above North Fork is Coarse Gold and above [89—58] Coarse Gold a couple of miles is Arizona Creek and one mile above Arizona Creek is Macklin Creek and about two miles above Macklin Creek is Henry Creek and a little ways above that is Captain Kennedy's cabin. It isn't marked on the map here but is between Henry Creek and Dreamy Gulch. The next creek is Taylor Creek, the next Homestake Creek and at the end of the trail is No. 32, the claim under discussion. To the best of my knowledge it would take an ordinary man going from Windquist's cabin in June or July, 1902, to proceed by boat from Windquist's cabin to Birch Hill and then walk to Checkers Town and from Checkers Town to Kennedy's cabin, five or six days. I don't believe you would make it under that. There were people along the river that year, at Shelton, Checkers Town, people on Dahl Creek and a great number of people up above but I don't know just where they were located because I was not over that year.

(Testimony of H. C. Ames.)

Cross-examination.

On the 28th day of June, 1902, I was freighting on the river. I don't know what trip I was engaged on on that date, nor whom I met on that date. There were not a great many travelling at that time. I went to the Kougarok in 1900. I knew where Windquist was living in June, 1902. I don't know where he was living in the fall of 1901. I wasn't up on the Kougarok in 1901. I never was there before 1903. From what I hear there were probably a thousand people up on the Kougarok prior to 1902, a stam-pede. There were trails up the Kougarok River in 1901, that is what I have been told. I was familiar with the Kougarok River in 1901 only from what I was told. It was my place to post people on the trail, that was part of the roadhouse business to get acquainted with the trails. I have lived in the Kougarok ever since that time and have become very familiar [90—59] with the Kougarok District. Yes, from my present knowledge of the Kougarok River I think Windquist could have taken a better course than the one he testified to in going up to Allen's Discovery. There weren't any towns or settlements up there, there were roadhouses. There was a roadhouse at Dahl Creek. I was not running a roadhouse in 1902. No one was running my roadhouse at Birch Hill in 1902. I quit running the roadhouse in the fall of 1901. I was freighting on the river from Mary's Igloo on up until towards fall. The first time I was up in the vicinity of No. 32 Above Allen's Discovery was in 1903. I knew Tom

(Testimony of H. C. Ames.)

Evans at that time also N. Methe. I knew that they had located some claims in January, 1902, on the Kougarok River and I knew where those claims were. I knew that Tom Evans had located No. 8. I had never heard that Evans and Methe had located No. 32. I knew they had located up as far as No. 31. I thought they had left No. 32 vacant. I located the Kshunti Fraction on July 25th, 1903. Found some colors of gold panning on the claim and placed my stakes on the claim marking the boundaries. I used a corner stake for an initial stake, a piece of box wood, the other stakes were willows. I wrote on them the numbers of the corners. I don't remember putting anything else on them. I don't know what you mean when you ask me why I kept my location notice in my pocket until 1908. I recorded it in 1903.

Mr. LOMEN.—It was probably a mistake of the Recorder in copying it.

Mr. COCHRAN.—(Reading.) Recorded 5 P. M. October 29th, 1908, Lars Gunderson, Recorder. The "3" might look like an "8." I exhibit that to you, gentlemen of the jury. The question is raised whether it is a "3" or an "8." [91—60]

Q. Did you record that notice before the 28th day of October, 1908? A. I did.

I don't know just the date I recorded that claim. I located the claim for George McLean; he told me to locate a claim for him. I did not hear his testimony to the effect that he did not tell me. After I had located the claim I told Mr. McLean about it

(Testimony of H. C. Ames.)

and that I wanted a deed for a half interest and I got a deed for a half interest. I now claim a half interest is this ground. Mr. McLean owns the other half. I have heard of Windquist's location of No. 32. I first heard of that in the fall of 1903. I was first up in that section of the country in 1903, and had no personal knowledge of the country prior to that time. I had learned of the various locations made by Evans, Methe and Armstrong in January, 1902, and I thought that they left No. 32 vacant. I did not relocate one of their locations, to wit, No. 30 at that time. I relocated it later on in 1904. I also relocated No. 27 in 1904 in the name of George McLean. No. 30 was also located in the name of George McLean, that is he was the agent of the man I located it for. I later on examined the records of No. 27 and 30 but not before I made the location in 1904, nor did I examine the records before I made the location of the Kshunti Fraction. At the time I located the Kshunti Fraction I did not know that a location of that identical ground was recorded in the name of Windquist. I did not at that time know there was any Number 32. I was told by the man who was there and helped locate those claims that there was no No. 32. That was Armstrong. He told me that in 1903. I was on this ground in controversy in 1904. I know Mr. Davidson. He was surveying the ground up there at that time, surveying along the Kougarok River. The surveyor's name who was with him was Crosby Keene I think. Armstrong was in the vicinity. He was familiar with the Kshunti

(Testimony of H. C. Ames.)

Fraction [92—61] and No. 32 and No. 8 and those claims along there. I don't know whether Gus Johnson assisted in making that survey as a flag-man or not. I saw Gus Johnson in the Kougarok in 1904. At the time that survey was made by the surveyor for Davidson the Kshunti Fraction lay where it is marked there on that map, exhibit "A." Yes, Mr. Armstrong told me about the location of those claims, the situation of them. When that survey was made in 1904 the Kshunti Fraction lay the same as it is marked there on the map, that is the upper end. The Bull Head Fraction is the claim between where the Kshunti Fraction is marked there and No. 31. The Bull Head Fraction takes in the balance of No. 32 which is not included in the Kshunti Fraction. Mike Nevins located the Bull Head Fraction. I assisted in the location of it. That was done at the time this case first came up, Mike Nevins and I located the balance of No. 32 not included in the Kshunti Fraction when this lawsuit came up. It was located in Mike Nevins' name. I was a witness. I have no interest in the Bull Head Fraction. At that time I did not have an interest in the location. The way Mike Nevins happened to come up there with me and make this location of the balance of the Windquist claim was because he heard about this lawsuit from me and came to the conclusion that there was no such claim as No. 32 and he considered the ground was open and he told me that he would go up and stake it. My initial stake was at the corner of No. 8 Below Connelly's Discovery. I tied

(Testimony of H. C. Ames.)

it to that corner of the bend in the river. My initial stake was about 150 yards in a westerly direction from the Kougarok River right alongside of stake No. 8. I don't know why I did not so state in the location notice. I cannot give you any reason why I did not so state in the location notice that my initial stake was at that corner. At that time those claims were not supposed to be worth much. I thought they [93—62] might let No. 8 claim go like they let lots of others go up there. That was one reason. I thought to tie it from the river would be as good way as any. I did what I thought was the best. I tied my claim to No. 8. I described where my claim was regardless of No. 8. I did some prospecting on the Kshunti Fraction when I made my location. I was there a good many days. We camped along there. I was probably on the claim fifty times. I was prospecting along there on the claim, probably a day all together. Then I went up to Macklin about a mile and a half above there. I returned to the claim in 1904, but did not do any active mining on the claim in 1904. I did my representing work on the claim during 1904. Did not do the work all at once but took a day or so now and then. Did the work probably along about the fourth of July, digging out this gulch here that is shown on the map. Ed Moran did some work for me also in 1904, later on in the fall. I sank a few holes.. I arrived in Nome a day before this trial started, on Tuesday. I have been working the past summer on Mascot Gulch about five miles from the ground in

(Testimony of H. C. Ames.)

controversy. I received word of the date of this trial last Saturday. I was at Taylor Creek when I learned of this case coming up for trial, three miles from the ground in controversy. It was noon on Saturday. I left Taylor Creek to come to Nome. Evans and I came down part of the way together. We arrived at Shelton Sunday night after dark. Stopped over night at Coarse Gold; got to Coarse Gold in the evening probably five or six o'clock; got into Shelton late, about eight o'clock. Stopped at Dahl Creek for lunch. We came down from Taylor Creek, leaving Taylor Creek at noon on Saturday, stopping at Dahl for lunch and stayed all night at Coarse Gold and got into Shelton the next day. [94—63]

Redirect Examination.

I did not go over the road Windquist says he went over. (Witness is handed a map drawn by witness.) I made this map according to scale as near as I could figure. It is about twelve miles from Dahl Creek to Shelton. It is about eighteen miles from Coarse Gold to Dahl. It is about seven miles from Taylor to Coarse Gold and about eighteen miles from Coarse Gold to Dahl across country the way I went. From Shelton we came to Nome by railroad. The railroad does not go around by Mary's Igloo. Nevins staked the Bull Head Fraction as a result of talking to me about this suit. I had at that time informed him that the Court had refused Windquist his injunction. I have no interest in the Bull Head Fraction. I never had an interest in the Bull Head Fraction.

(Testimony of H. C. Ames.)

At the time I staked the Kshunti Fraction I did not see any mounds at the points on map exhibit "A," where the northerly corners of No. 32 are shown. If there had been any there I would have seen them.

Recross-examination.

It is about seven miles from Taylor to Coarse Gold Creek. I said I started from Taylor about noon and got in to Coarse Gold about dinner time.

(Witness excused.)

[Testimony of Ed. Moran, for Defendant.]

Whereupon, ED. MORAN was called as a witness on behalf of defendant and after being duly sworn testified as follows:

My name is Edward Moran. I have lived in the Kouragok since 1900. I know Mr. Ames who was just on the stand and know the Kshunti Fraction. Was present when it was located. I signed the location notice as a witness. The claim was located in July, 1903. Besides myself Mr. Ames, Mr. Armstrong, Jack Blocker and Joe Sales were present. I did not know No. 8, 'Tom Evens' claim at that time.

[95—64] The initial stake of the Kshunti Fraction was placed on the raise of the hill going over the portage at the bend of the river. I guess it would be on the west side of the Fraction or the southwest. I would judge it to be the southwest corner. The river makes a kind of a bend right there. I did not go to the other corner. The initial stake was a piece of board. I generally went over the claim on my way down for groceries or anything else I wanted at the Forks. I did some work on the claim, the

(Testimony of Ed. Moran.)

Kshunti Fraction, the following year on the right limit of the river a litle above the gulch. (Witness points out initial stake of the Kshunti Fraction on the map), and the place where he did the work the following year. There was writing on the initial stake but I did not examine it. I have no interest in the case.

Cross-examination.

That was my first trip up the river. I did not know anything about any of the claims in that vicinity at that time. We were working on No. 27 Above Allen's Discovery at that time. I was doing assessment work. That was before we located the Kshunti Fraction. We had been working there three or four days before we located the Kshunti Fraction. It was located in the name of McLean who was on the stand. We crossed No. 31 going up there. I did not know where No. 32 was but I had an interest in No. 30. We placed the initial stake of the Kshunti Fraction in a little mound. I didn't notice any other stakes around there. I believe there were but I could not say. I don't know whether they put a mound around or not, or whether there was a mound there before nor whether there was a stake of No. 8 around there. I could not tell you. I did not know where No. 8 was. I might have seen a stake of No. 8 at the corner where we put the initial stake but I don't remember now.

(Witness excused.) [96—65]

**[Testimony of H. C. Ames, the Defendant, Recalled
in His Own Behalf.]**

And thereupon H. C. AMES, the defendant, was recalled in his own behalf and testified as follows:

There was no trace of a tundra fire in the vicinity of the Kshunti Fraction when I was up there in 1903 nor on No. 32. If there had been a fire there in the fall or summer of 1902, I would have seen traces of it. I never destroyed or removed any of the stakes of No. 32 or any other stakes and do not know of any being destroyed by anybody.

Cross-examination.

There was not a tremendous tundra fire in the vicinity of the Kshunti Fraction in 1902. There were a few fires, one on Macklin Creek that swept over a certain section in 1903, but the main Kougarok River was all burned off in 1904, preparing for the ditches that were built in 1904. There was a large tundra fire there in 1904.

Redirect Examination.

The tundra fire of 1904 did not destroy any of the stakes on No. 32 or the Kshunti Fraction.

(Witness excused.)

Defendant rests.

**[Testimony of Jerry Sullivan, Recalled, in Rebuttal,
in His Own Behalf.]**

Whereupon JERRY SULLIVAN was recalled in rebuttal in his own behalf and testified as follows:

In the month of May, 1912, I had a discussion with Tom Evans in regard to this case which took place on No. 9 Above Connelly's Discovery. At that time

(Testimony of Jerry Sullivan.)

I had no interest in this case at all. In that conversation Mr. Evans stated in my presence in substance that Captain Kennedy was dead, that Armstrong and Methe were out of the [97—66] country and that he was the only one that knew anything about the location of No. 32, and that he had mined through No. 8 over on to No. 32, and that he had to protect himself on that account, and that he knew Windquist located and owned No. 32, but that 600 feet, being the portion below the Kshunti Fraction, was enough for him for what he had done upon the claim, and he further stated at that time that the Kougarokers must stand together and keep outsiders from getting in on the ground.

Cross-examination.

This conversation I speak of took place all at one time. Nobody was present but Tom Evans and myself. He came up to me. I have gotten written down the exact words. He came up and asked me if I wanted to buy his interest in No. 6 Above Connelly's Discovery. He said that he wanted some money to go to Nome to try and stop an injunction, that Windquist had applied for against Ames. He said "Windquist is the owner of the claim." He said, "Captain Kennedy is dead, Methe and Armstrong are on the outside and nobody knows a thing about it now but me. We have to stick together and keep strangers out." He said, "I think six hundred feet would be enough for him for what he has done on the claim." I wrote that down right after he left me. I wrote it down because I saw he was

(Testimony of Jerry Sullivan.)

forming a scheme to rob a man out of what was lawfully belonging to him. Evans and I were friendly at that time. I told him it was not much to his credit to be upholding a thief. I bought into this claim because I knew Windquist was the owner. I have been there since 1904 and I never heard any claim to it but Windquist's until 1911. I am friendly with Jim Kelliher. I spoke to him to-day. I am on speaking terms with him and I am not in competition with him in any way in regard to mining matters. Yes, I have heard that Jim Kelliher was interested in the Kshunti Fraction and also in the Bull Head Fraction. I learned. [98—67] that in 1913 after I had bought this interest. I swear that I did not know that Jim Kelliher was interested before I bought from Windquist. It is not a fact that I bought from Windquist in order to head Kelliher off. I am not particularly hostile to Jim Kelliher to-day. I advertised him out of No. 6 Above and Nos. 3 and 4 Below on Trinity Creek. I never had a dispute in my life, with Kelliher in regard to mining matters. Evans came to sell me No. 6 because, as he said, he needed the money to go to Nome on. I didn't know that Kelliher had bought No. 6 from Evans the year before. I know it now. Evans told me so later on. I think that was in 1913 after I advertised Kelliher out, or about that time. I didn't know he had an option on it before that. I never knew he was after it and wanted it. I had a three-fourths interest in No. 6 before that. I never tried to buy Evans' interest, he came to me.

(Testimony of Jerry Sullivan.)

It was before the hearing on the injunction, the day before he started down. I don't know where he made the raise to come down. I understood from him that he did not have the money and wanted to sell his ground to get the money. I have the diary with me in which I made this memorandum. (Witness produces diary.) The diary is in my own handwriting.

I have two or three different diaries up there. This book is in my handwriting, all of it. Yes, that is the only entry in the book of anything that took place at that time, I have other books with other entries in them. At the time I made this memorandum I thought Evans was trying to beat somebody out of his claim. I knew nothing about the merits of the controversy between Windquist and Ames. I knew nothing about the case at all. I never heard of the ground being claimed by anybody but Windquist until 1911. I did inform someone else about the conversation I had with Evans in May, 1912. I informed Tom Connelly about it a few daws afterwards and he said he had a similar conversation [99—68] with Evans down in Mike Blum's cabin. I told Connelly about this four or five days after it happened. I did nothing to head Evans off after I knew he was coming down to try to settle the lawsuit. I did not prefer to hold it until I could get the interest myself and then spring it. I didn't expect to get any interest at that time myself. I did not tell Windquist anything about the transaction. I bought No. 32 the 19th day of May, 1913, after the

(Testimony of Jerry Sullivan.)

first trial of this case.

Q. Now, why wasn't this information that you had, used on the previous trial?

A. Because I could not come down myself and I wasn't much acquainted with Windquist and I didn't want to come down.

I had this information myself for a year or more and Windquist didn't know anything about it. I believe that I told Mike Campbell about it right here in town about the time I bought the claim. All of this was written down by myself at the same time.

Mr. LOMEN.—We offer the memorandum in evidence.

(Memorandum admitted in evidence with the permission to plaintiff to withdraw same after being read to the jury.)

[Memorandum Read to Jury.]

Mr. Lomen reads memorandum to jury as follows:

“He said he had to protect himself. I asked him in what way. He said he had drifted a little over the line. I said, ‘I don't think the old man will cause you any trouble.’ He said, ‘There would be no trouble but for Gus Johnson and if I can get to town and see one party before he gets there I will stop the injunction.’ ‘While you say you witnessed the staking for Windquist, now you want to stop the injunction on a man that is trying to steal a part of the claim from him. Is that fair.’? [100—69]

WITNESS.—(Continuing.) He said at that time to me that he had witnessed the staking for Wind-

quist and that Methe had located a claim for Windquist.

Plaintiff rests in rebuttal.

**[Testimony of Tom Evans, Recalled in Surrebuttal,
for Defendant.]**

Whereupon TOM EVANS was recalled on behalf of defendant in surrebuttal, and testified as follows:

I sold No. 6 Above Connelly's Discovery to James Kelliher in the fall of 1911. I never told Jerry Sullivan that I had witnessed any location for Windquist, or made any location for Windquist, never at any time. I never had any such a conversation with Jerry Sullivan as is written down in that book.

Defendant rests.

**[Motion for Leave to File an Amended and
Supplemental Answer etc.]**

Mr. LOMEN.—I move at this time for permission to file an amended and supplemental answer in this case alleging forfeiture of any claim known as No. 32 Above Allen's Discovery, if ever located, because of failure to do assessment work on the claim in 1911 and also in 1912. As far as the 1912 work is concerned it is an alleged fact that occurred subsequent to the commencement of this action.

Motion overruled, to which the defendant then and there excepted and exception allowed.

[Motion for a Directed Verdict.]

Mr. LOMEN.—I, at this time, move that the Court direct the Jury to return a verdict for the defendant.

The COURT.—Motion overruled.

To which ruling the defendant then and there excepted and exception allowed. [101—70]

AND THEREUPON and within the time allowed by the Court, the Court having been previously requested that the instructions to the jury be in writing, the defendant requested the Court to give the jury the following instructions, to wit:

[Instructions Requested by Defendant.]

“You are hereby instructed to find a verdict, in favor of the defendant.”

Which instruction the Court refused to give to the jury, to which ruling the defendant excepted and exception allowed.

And the Court refused to give the following instruction requested by defendant:

“If you find from the evidence that one N. Methe, on or about the 10th day of January, 1902, took any steps towards locating, or did any act tending to locate the premises described in the complaint, or any part thereof, then I charge you that such step or steps, act or acts, if any, done by said N. Methe as the agent of any other person than the plaintiff N. O. Windquist, or in the name of another than the said plaintiff Windquist, did not inure to the benefit of the plaintiff Windquist and did not constitute any act of location on the part of said plaintiff Windquist; and I further charge you that then and in that case neither said plaintiff Windquist nor any other person acting for or on behalf of said Windquist, could appropriate said acts of said Methe, or any of them, as an act of location in the name of or for the benefit of said Windquist. And I further

charge you that if said Windquist performed any act or acts in order to perfect, or necessary to perfect the location of the premises located, or attempted to be located by said Methe, with the intention of perfecting the location made, or attempted to be made by said Methe, then such act or acts on the part of said Windquist would not operate as or constitute an original location by Windquist or inure in any manner to the [102—71] benefit of said Windquist unless you find that said Methe, in the manner of locating or attempting to locate said premises, acted as the agent of Windquist and not as the agent of another.”

To the refusal of the Court to give such instruction the defendant excepted and exception allowed.

And the Court refused to give the following instruction requested by defendant:

“I further charge you that in Alaska it is not necessary to record any notice of location, and that when a location is made for an absent locator, whether with or without his authority, or with or without his knowledge whatever rights are given to him by such location, vest in him at once, and even the person locating such absentee cannot take down the name of such absentee and insert the name of another whether in the notice posted on the ground, if any, or in the certificate of location prepared for record, if any.”

To which refusal defendant excepted and an exception allowed.

And the Court refused to give to the jury the following instruction requested by defendant:

“I further charge you that plaintiff, in order to recover in this action, must prove the title alleged in the complaint, to wit: Title under a location made on or about the 10th day of January, 1902, notice of which location was recorded in volume 32, at page 170 of the records of the Kougarok Recording District, District of Alaska.”

To which refusal defendant excepted and exception allowed. [103—72]

AND THEREUPON counsel for both parties proceeded to address the jury and the Court proceeded to instruct the jury as follows:

*In the District Court for the District of Alaska,
Second Division.*

N. O. WINDQUIST,

Plaintiff,

vs.

H. C. AMES,

Defendant.

Instructions to the Jury [in Bill of Exceptions].

Gentlemen of the jury:

This is an action brought by the plaintiff, N. O. Windquist, against the defendant, H. C. Ames, for the recovery of the possession of a certain placer mining claim described in the complaint as No. Thirty-two (32) Above Allen's Discovery on Kougarok River, in the Kougarok Recording District, District of Alaska; and describing it by metes and bounds, and alleging that plaintiff is the owner by virtue of a location made in January, 1902.

Plaintiff further alleges that in February, 1912,

the defendant wrongfully and unlawfully entered in and upon said premises and ousted and ejected plaintiff therefrom; and ever since and now wrongfully withholds the possession therefrom from plaintiff, to his damage in the sum of Five Thousand (\$5,000) Dollars; and prays for judgment for the possession and for damages.

To the foregoing complaint, the defendant has filed an answer in which he denies each and every allegation of the complaint, and sets up by the way of an affirmative defense: [104—73]

1. That he is the owner and in the possession and entitled to the possession of, a certain placer mining claim known as the Kshunti Fraction, situated in the Kougarok Recording District; and describing said fraction by metes and bounds alleges that said claim was located on the 25th day of July, 1903, by one G. J. McLean by marking the boundaries thereof by substantial stakes and monuments, so that its boundaries could be readily traced, making discovery of gold thereon, and recording a notice of location thereof.

2. That the said G. J. McLean sold and conveyed by deed in writing an undivided one-half ($\frac{1}{2}$) of said claim to defendant, and that the defendant is owner of said premises.

3. Defendant further alleges that if plaintiff's mining claim, as described in the complaint, overlaps the said Kshunti Fraction in whole or in part, such overlap is junior in time and inferior in right to the title of defendant, and that plaintiff has no right, title or interest in or to said overlap, or any part thereof.

4. Defendant disclaims any right, title or interest in or to the premises described in the complaint, except as to that portion as may be found to overlap the Kshunti Fraction.

As a second defense defendant alleges that ever since the 25th day of July, 1903, the defendant and his co-owner and predecessor in interest, G. J. McLean, have been, and now are in the actual, uninterrupted, open, adverse, notorious and exclusive possession of the Kshunti Fraction as described in defendant's answer. That said claim was, during all said time, well and plainly marked and defined by good, substantial, visible and permanent [105—74] stakes and monuments, so that the boundaries could be readily traced.

To the affirmative defense as pleaded by the defendant, plaintiff has filed a reply denying each and every allegation contained in the first and second defenses. For a more particular description of the allegations contained in the pleadings, you may consult the pleadings which you will take with you to the jury-room.

In a civil case like this, the affirmative of an issue must be proved by the party alleging it, by a preponderance of the evidence. The burden of proof is upon the plaintiff to prove all the essential acts for the perfection of his location, as alleged in the complaint; and the burden is upon the defendant to prove all the steps necessary for the making of a valid location of the Kshunti Fraction, as alleged in the first affirmative answer, also the facts alleged by him in the second affirmative defense contained in the answer.

The plaintiff must recover upon the strength of his own title and not upon the weakness of defendant's title. If you should find, from a preponderance of the evidence, that the plaintiff did not perform all the acts necessary to be performed in the making of a valid location of a placer mining claim, or if it should appear that at the time plaintiff attempted to make a location of the claim known as No. Thirty-two (32) it had been previously properly located in the name of another, and had not been abandoned nor forfeited, then your verdict should be for the defendant, irrespective of the question as to whether he had a valid location of the Kshunti Fraction.

The requisites of the valid location of a placer mining claim are: [106—75]

1. The premises sought to be located must be open, unappropriated public domain of the United States.

2. There must be a discovery of gold made within the exterior boundaries of the claim.

3. The exterior boundaries of the claim must be so marked by natural objects or permanent monuments that the boundaries can be readily traced.

In a case of this character, the judge and jury of this court have separate functions to perform. It is your duty to hear all the evidence, all of which is addressed to you, and to decide thereupon all questions of fact. It is the duty of the Judge of this court, upon the other hand, to instruct you upon the law applicable to the facts and evidence in this case, and the statute makes it your duty to accept as law

what is laid down as such by the Court.

You are instructed that you, as jurors, are the sole judges of the credibility of witnesses and the weight to be attached to their testimony. Your power, however, is not arbitrary but it is to be exercised with discretion and in subordination to the rules of evidence. You may take into consideration the interest the witness has, if any, in the result of the trial; his bias or prejudice, if any, for or against the parties; his mental capacity for knowledge and his means of knowing that about which he testifies; the reasonableness or unreasonableness of his statements; his demeanor on the witness stand; his candor or evasion, if either appear; and applying your knowledge and observation of human actions, motives and affairs, you will find the truth and present the same in your verdict. [107—76]

The law also makes it my duty to instruct you that you are not bound to find in conformity to the testimony of any number of witnesses which do not produce conviction in your minds, against a less number, or against a presumption or other evidence satisfying your minds.

You are also instructed that a witness who is wilfully false in one part of his testimony may be distrusted by you in other parts. If you find that any witness in this case has testified falsely in one part of his testimony, you are at liberty to reject all or any part of his testimony, but you are not bound to do so; you may reject the false part and give such weight to other parts as you may think they are entitled to receive.

You are instructed that if the testimony of a witness appears to be fair, and not unreasonable, and is consistent with itself, and the witness has not been in any manner impeached, then you have no right to disregard the testimony of such witness from mere caprice and without cause. It is your duty to consider the whole of the evidence and to render a verdict in accordance with the weight of all the evidence in the case.

You are instructed that the affirmative of the issue shall be proved by the party alleging it, and, when the evidence is contradictory, your finding should be in accordance with the preponderance of the evidence. In determining upon which side the preponderance of the evidence is, you should bear in mind the rules given in these instructions for the weighing of testimony.

You are instructed that, under the laws of the District of Alaska relative to the appropriation of mining claims, it [108—77] is not necessary to record a notice of location in order to perfect a claim. If title to a claim has been initiated by a discovery of gold and marking of the boundaries by stakes and monuments and written notice posted on the claim, such title cannot be defeated by changing the name in the recorded notice, nor by taking down the notice which has been posted upon the claim and placing thereon a notice containing the name of another.

The main question for you to pass upon in this case is which of the parties to this litigation has the better right to the ground in controversy, under

the testimony as produced in the trial and the law as given you by the Court.

I hand you herewith two forms of verdict drawn in conformity with the law. When you have retired to your jury-room, and have agreed upon your verdict, each one for himself, you should have your foreman, to be selected by yourselves, sign the one upon which you unanimously agree and return it into court as your verdict in this case.

You may take with you into the jury-room for your guidance the exhibits and the pleadings in the case.

Let the bailiffs be sworn. You may now retire, gentlemen, to deliberate upon your verdict.

Nome, Alaska, October 15, 1914.

J. R. TUCKER,

District Judge.

AND THEREUPON after the jury had been instructed by the Court the jury retired to consider their verdict, and thereafter returned into court with a verdict in favor of the plaintiff and against the defendant in words and figures as follows:

[109—78]

*In the District Court for the District of Alaska,
Second Division.*

JERRY SULLIVAN,

Plaintiff,

vs.

H. C. AMES,

Defendant.

Verdict [in Bill of Exceptions].

We the jury in the above-*entitled find* for the plaintiff and that the plaintiff is entitled to the possession of the mining claim known and described as No. 32 Above Allen's Discovery on Kougarok River in the Kougarok Recording Precinct, Alaska, and the whole thereof, as described in plaintiff's complaint, and defendant is not entitled to the possession of any part thereof and we assess plaintiff's recovery at one dollar.

Dated this 16th day of October, 1914.

C. E. DARLING,

Foreman.

Which verdict was received by the Court and ordered filed as the verdict of the jury.

That thereafter, and within the time allowed by law, defendant filed his motion for a new trial which was in words and figures as follows, to wit:

*In the District Court for the District of Alaska,
Second Division.*

N. O. WINDQUIST, now by Substitution JERRY
SULLIVAN,

Plaintiff,

vs.

H. C. AMES,

Defendant. [110—79]

Motion for a New Trial [in Bill of Exceptions].

Comes now the defendant in the above-entitled action and moves the Court that the verdict here-

tofore rendered in said action be set aside and a new trial of said action granted on the following grounds:

I.

Newly discovered evidence material to said defendant which he could not with reasonable diligence discover and produce at the trial as appears from the affidavit of G. J. Lomen hereunto annexed and made a part hereof.

II.

Insufficiency of the evidence to justify the verdict and the said verdict is against law in this, to wit:

That there was no sufficient evidence produced at the trial to establish plaintiff's alleged location of No. 32 Above Allen's Discovery on the Kougarok River as alleged in plaintiff's complaint, and for the reason that there was no evidence whatever offered at the trial to establish such location for the reason that said action was an action in ejectment and that plaintiff sought to recover the premises in controversy by a mining location thereof alleged in plaintiff's complaint to have been made on January 10th, 1902, and no sufficient evidence, nor any evidence whatever, was produced upon said trial to establish such location.

III.

Errors in law occurring at the trial and excepted to by the defendant, to wit:

(a) That the Court erred in refusing to grant defendant's motion for a directed verdict made at the conclusion of the trial and before the Jury had retired. [111—80]

(b) That the Court erred in refusing to give the following instruction requested by the defendant:

“You are hereby instructed to find a verdict in favor of the defendant.”

(c) That the Court erred in refusing to give the following instruction requested by defendant:

“If you find from the evidence that one N. Methe, on or about the 10th day of January, 1902, took any steps towards locating, or did any act tending to locate the premises described in the complaint, or any part thereof, then I charge you that such step or steps, act or acts, if any, done by said N. Methe as the agent of any other person than the plaintiff N. O. Windquist, or in the name of another than the said plaintiff Windquist, did not inure to the benefit of the plaintiff Windquist and did not constitute any act of location on the part of said plaintiff Windquist; and I further charge you that then and in that case neither said platiff Windquist, nor any other person acting for or on behalf of said Windquist could appropriate said acts of said Methe, or any of them, as an act of location in the name of or for the benefit of said Windquist. And I further charge you that of said Windquist performed any act or acts in order to perfect, or necessary to perfect the location of the premises located, or attempted to be located by said Methe, with the intention of perfecting the location made, or attempted to be made by said Methe, then such act or acts on the part of said Windquist would not operate as or constitute an original location by Windquist or inure in any manner to the benefit of

said Windquist unless you find that said Methe, in the manner of locating or attempting to locate [112—81] said premises, acted as the agent of Windquist and not as the agent of another.”

(d) That the Court erred in refusing to give the following instruction requested by defendant:

“I further charge you that in Alaska it is not necessary to record any notice of location, and that when a location is made for an absent locator, whether with or without his authority, or with or without his knowledge, whatever rights are given to him by such location, vest in him at once, and even the person locating such absentee cannot take down the name of such absentee and insert the name of another whether in the notice posted on the ground if any, or in the certificate of location prepared for record, if any,”

(e) That the Court erred in refusing to give the following instruction requested by defendant:

“I further charge you that plaintiff, in order to recover in this action, must prove the title alleged in the complaint, to wit: Title under a location made on or about the 10th day of January, 1902, notice of which location was recorded in volume 32, at page 170 of the records of the Kougarok Recording District, District of Alaska.”

GEO. B. GRIGSBY,

G. J. LOMEN,

Attorneys for defendant. [113—82]

*In the District Court for the District of Alaska,
Second Division.*

N. O. WINDQUIST, now by Substitution JERRY
SULLIVAN,

Plaintiff,

vs.

H. C. AMES,

Defendant.

AFFIDAVIT OF G. J. LOMEN.

United States of America,
Territory of Alaska,—ss.

G. J. Lomen, being duly sworn on oath deposes and
says:

That he is one of the attorneys for the defendant
in the above-entitled action; that said action came
on for trial on the 14th day of October, 1914; that
before the trial commenced the attorney for plain-
tiff, N. O. Windquist, moved that one Jerry Sullivan
be substituted as plaintiff in said action on the
ground as therein stated by counsel for plaintiff
that said Jerry Sullivan had succeeded to the in-
terest of N. O. Windquist in the premises described
in the complaint and was then and there the real
party in interest; that affiant did not then know nor
did defendant or his counsel know that said Jerry
Sullivan had theretofore, and affiant alleges the fact
to be that said Sullivan, on or about the 5th day of
November, 1913, by deed in writing on the date last
aforesaid and recorded in volume 81, page 95 of the
records of the Kougarak Recording District of Al-

aska, conveyed the interest acquired from said N. O. Windquist to one Con Kelly; that the above facts became known to affiant after the verdict rendered in the above-entitled action and could not with reasonable diligence have been ascertained before the trial of said action, the counsel for defendant relying upon the statement made by counsel for plaintiff in moving for the substitution of plaintiff. [114—83]

That by reason of the facts above set forth, affiant states that said action was not prosecuted in the name of the real party in interest, but in the name of said Jerry Sullivan, who appears by the transfer to said Con Kelly to have parted with his interest in the premises in litigation herein.

G. J. LOMEN.

Subscribed and sworn to before me this 19th day of October, 1914.

[Seal]

D. B. CHACE,

Notary Public in and for the Territory of Alaska,
Residing at Nome, Alaska.

(My commission expires May 12, 1917.)

And thereafter the following affidavits were filed in resistance to the motion for a new trial in behalf of plaintiff:

*In the District Court for the District of Alaska,
Second Division.*

JERRY SULLIVAN,

Plaintiff,

vs.

H. C. AMES,

Defendant.

**Affidavit [of Jerry Sullivan, in Opposition to Motion
for a New Trial].**

United States of America,
Territory of Alaska,—ss.

Jerry Sullivan, being duly sworn, says: That he is the plaintiff in the above-entitled action; that he has read the affidavit of G. J. Lomen attached to the motion for a new trial [115—84] filed by the defendant in the above-entitled action; that it is true that on the 5th day of November, 1913, affiant made, executed and delivered to one Con Kelly of Nome, Alaska, a certain instrument in writing purporting to be a deed of conveyance conveying the mining claim known as No. 32 Above Discovery, with other claims in the Kougarok Recording District, to the said Kelly, and affiant verily believes that said deed is of record in the Kougarok Recording Precinct, Alaska, as stated in the aforesaid affidavit of said Lomen.

And affiant further says that the said Kelly is not now, and was not at the time of the trial of this action, the owner of said mining claim No. 32 Above Allen's Discovery, the claim in controversy in this action; that affiant was at the time of trial of said action, and now is, owner in fee of said mining claim subject only to the paramount title of the United States; that said deed was given to said Kelly to secure the payment of a large sum of money due and owing from affiant to the said Kelly and is and was intended

as a mortgage to secure said amount, and that said Kelly had at said time, and now has, no interest in said mining claim other than as mortgagee therein.

JERRY SULLIVAN.

Subscribed and sworn to before me this 27th day of October, 1914.

T. M. REED,

Notary Public.

My commission expires Aug. 31, 1918. [116—85]

*In the District Court for the District of Alaska,
Second Division.*

JERRY SULLIVAN,

Plaintiff,

vs.

H. C. AMES,

Defendant.

**Affidavit of Con Kelly [in Opposition to Motion for
a New Trial].**

United States of America,
Territory of Alaska,
Cape Nome Precinct,—ss.

Con Kelly, being duly sworn, says: That he is the same Con Kelly mentioned in the affidavit of G. J. Lomen, attached to the motion for a new trial, in the above-entitled action; that he has heard said affidavit read and knows the contents thereof; that it is true that on or about the 5th day of November, 1913, affiant received from Jerry Sullivan, the plaintiff in the above-entitled action, a deed conveying to him the mining claim known as No. 32 Above Discovery,

and other claims in the Kougarok Recording District; that said deed was placed for record and is now of record in said Kougarok Recording District, Alaska.

Affiant further says: That said deed was given by the said Sullivan to affiant as security for money loaned by affiant to the said Sullivan, and for no other purpose; that affiant and the said Sullivan prior to the execution of said deed, agreed that said deed should be given to affiant as security for moneys theretofore and at said time loaned by affiant to said Sullivan and for no other purpose, and affiant does not now claim, nor has he ever claimed to be the owner of said placer mining claim and has no intrest and has never claimed to have any interest [117—86] therein, except as mortgagee of the mining claims and properties mentioned in said deed; that said deed was at the time the same was executed, intended to be and is now in fact a mortgage made and executed by the said Sullivan to affiant as security for moneys loaned to the said Sullivan by affiant.

CON KELLY.

Subscribed and sworn to before me this 27th day of November, 1914.

[Seal]

T. M. REED,
Notary Public.

My commission expires August 31, 1918.

That thereafter on the 2d day of January, 1915, a hearing was had upon said motion for a new trial, and upon said hearing defendant offered, and there was admitted in evidence, a deed of conveyance from plaintiff, Jerry Sullivan, to one Con Kelly conveying

from Jerry Sullivan to Con Kelly all the right, title and interest of Jerry Sullivan in and to the claim known as No. 32 Above Allen's Discovery, on the Kougarok River, as follows:

[Exhibit—Deed of Mining Claim.]

THIS INDENTURE made the 5th day of November in the year of our Lord one thousand, nine hundred and thirteen between JERRY SULLIVAN of Nome, Alaska, the party of the first part, and Con Kelly of Nome, Alaska, the party of the second part,

WITNESSETH; That the said party of the first part, for and in consideration of the sum of Ten (\$10) Dollars Gold Coin [118—87] of the United States of America, to him in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and forever quitclaimed, and by these presence does grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part, and to his heirs and assigns, all his right, title and interest in and to the following described portions of the following-described placer mining claims, to wit: An undivided one-half ($\frac{1}{2}$) of No. 9 Above Connolly's Discovery, an undivided three-fourths ($\frac{3}{4}$) of No. 6 Above Connolly's Discovery, an undivided one-eighth ($\frac{1}{8}$) of No. 2 Below Connolly's Discovery, all of No. 4 Below Connolly's Discovery, an undivided one-fourth ($\frac{1}{4}$) of No. 25 Above Allen's Discovery, all of No. 32 Above Allen's Discovery, all of said claims being situated on the Kougarok River; an undivided one-half ($\frac{1}{2}$) of No. 3 Below

on Trinity Creek, an undivided one-half ($\frac{1}{2}$) of No. 4 Below on Trinity Creek, a tributary to the Kougarok River, an undivided one-half ($\frac{1}{2}$) of No. 2 from the mouth on Macklin Creek, a tributary to the Kougarok River and all of the Oblong Fraction adjoining No. 9 Above Connolly's and No. 12 Below Johnson's Discovery, 1st tier of Benches on the right limit of the Kougarok River in the Kougarok Recording District, District of Alaska.

TOGETHER with all and singular the tenements, hereditaments, appurtenances, rights and privileges thereunto belonging or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises and every part and parcel thereof, with the appurtenances. [119—88]

TO HAVE AND TO HOLD all and singular the said premises together with the appurtenances and privileges thereto incident unto the said party of the second part, and to his heirs and assigns forever.

IN WITNESS WHEREOF the said party of the first part has hereunto set his hand and seal the day and year first above written.

JERRY SULLIVAN.

Signed, sealed and delivered in the presence of:

C. E. KIMBALL,

JAS. M. STREETEN.

United States of America,
District of Alaska,—ss.

On this 5th day of November, A. D. one thousand

nine hundred and thirteen, personally came before me Jas. M. Streeten, a notary public in and for said District, the within-named Jerry Sullivan to me personally known to be the identical person described within and who executed the within instrument and he acknowledged to me that he executed the same freely, for the uses and purposes therein mentioned.

WITNESS my hand and seal this 5th day of November, 1913.

[Notarial Seal]

JAS. M. STREETEN,

Notary Public in and for the District of Alaska.

My commission expires 1st Sept., 1914.

United States of America,

District of Alaska,—ss.

This is to certify that I, F. H. Thomas, United States Commissioner and Ex-officio Recorder in and for the Kougarok Precinct, in the Second Division, District of Alaska, have compared [120—89] the within and foregoing copy of a deed with an instrument as the same appears of record Vol. 81 at Page 95 of the Records of said Precinct, and that the within and foregoing is a true and correct transcript of said record and of the whole thereof.

Witness my hand and seal this 18 day of April, 1914.

F. H. THOMAS,

U. S. Commissioner and Ex-officio Recorder.

(Recorded at the request of Jerry Sullivan, September 13, A. D. 1913, at 2 o'clock P. M., in vol. 81, of Deeds, at page 95, Records of Kougarok Recording Precinct. F. H. Thomas, Recorder.)

And the Court, after hearing the argument of counsel and having duly considered the same, overruled and denied the motion for a new trial.

To the order and ruling of the Court denying the motion for a new trial, defendant then and there excepted, which exception was allowed by the Court.

That thereafter and on the 9th day of January, 1915, judgment was entered upon the verdict rendered as aforesaid, and the defendant was granted twenty (20) days from and after the entry of judgment in which to prepare and file a bill of exceptions herein.

That thereafter, to wit, on the 27th day of January, 1915, defendant was granted thirty (30) days additional time in which to prepare and file a bill of exceptions herein. [121—90]

That thereafter, to wit, on the 27th day of February, 1915, defendant was granted twenty (20) days further time in which to prepare and file a bill of exceptions herein, and thereafter, on the 20th day of March, 1915, defendant was granted ten (10) days additional time and until the 30th day of March, 1915, in which to prepare and file said bill of exceptions.

Wherefore, defendant prays for an order of this court settling and allowing the foregoing bill of exceptions.

GEORGE B. GRIGSBY,

Attorney for Defendant.

Service of the within and foregoing bill of exceptions admitted this 29th day of March, 1915.

T. M. REED,

Of Attorney for Plaintiff.

Order Settling Bill of Exceptions.

The above and foregoing bill of exceptions having been served, filed and presented within the time allowed by law, and being full, true and correct, and containing all the evidence introduced at the trial, the same is hereby settled and allowed.

Done in open court this 3d day of July, 1915.

J. R. TUCKER,
District Judge. [122—91]

[Endorsed]: #2372. In the District Court for the District of Alaska, 2d Division. N. O. Windquist, now by Substitution Jerry Sullivan, Plaintiff, vs, H. C. Ames, Defendant. Proposed Bill of Exceptions. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Mar. 29, 1915. G. A. Adams, Clerk, By ———, Deputy. L. Refiled in the office of the clerk of the District Court of Alaska, Second Division, at Nome. Jul. 3, 1915. G. A. Adams, Clerk. By ———, Deputy. Orders and Judgments, vol. 11, page 139. [123]

*In the District Court for the District of Alaska,
Second Division.*

N. O. WINDQUIST, now by Substitution, JERRY
SULLIVAN,

Plaintiff,

vs.

H. C. AMES,

Defendant.

Assignment of Errors.

Comes now the defendant above-named and assigns the following errors upon which he will rely:

I.

That the Court erred in overruling defendant's objection to the following testimony of George J. McLean, a witness produced for the plaintiff, as follows: (George J. McLean testifying.)

"After I heard that the Kshunti Fraction had been located, I had a conversation with Mr. Ames with reference to it.

Q. What did you tell him?

Mr. LOMEN.—Objected to as immaterial.

The COURT.—Overrule the objection."

To which ruling an exception was duly made and allowed.

"A. I told him, I said, 'You had better cut this fraction business out.' I said, 'I will have nothing to do with a claim that is jumped.'

Mr. LOMEN.—Move that the answer be stricken out.

The COURT.—Overrule motion."

To which ruling an exception was duly made and allowed.

II.

That the Court erred in overruling defendant's objection to the following testimony of George J. McLean, a witness produced [124] on behalf of the plaintiff, as follows: (Witness testifying.)

"I was requested several years ago by Mr. Windquist to make a survey of this ground.

Q. What was the survey to be made for?

Mr. GRIGSBY.—Objected to as immaterial and self-serving.

The COURT.—Objection overruled.”

To which ruling an exception was duly taken and allowed.

“A. I was instructed to survey No. 32 by Mr. Windquist. He told me that his claim had been jumped.”

III

That the Court erred in sustaining plaintiff's objection to certain testimony of the witness Gus Johnson as follows: (Witness testifying on cross-examination.)

“I first went to the initial stake and from there to the corners.

Q. Up to what corner?

A. I don't remember which one, to the south-east corner, I believe.

Q. Which side of the river were you on?

Mr. COCHRAN.—I object to this cross-examination. We have only put him on for one purpose and I don't care to go into all his testimony at this time. I simply wanted to show he knew where the boundaries were.

Mr. LOMEN.—I am trying to show he didn't know anything about it.

The COURT.—When he comes back you may go through this examination.

Mr. LOMEN.—If it please the Court the purpose of [125] this testimony is to authorize the map to go in evidence as a correct plat of some claim that was located. I want to show

this map was not based on the knowledge of anybody who knew anything about the claim at all and it cannot be introduced in evidence.

The COURT.—I think the map is sufficiently proven.

Mr. COCHRAN.—I now offer the map in evidence if your Honor please.

Mr. GRIGSBY.—We wish to finish our examination.

Mr. REED.—We object to immaterial matters and not directed to the exact point of the examination in chief.

Mr. LOMEN.—Before I get through with this witness I want to get evidence, sufficient at least, to have the Jury pass upon the question as to whether those willow stakes he says he saw in 1902 were there when he fixed up the stakes in 1904. We want to find out how much he knew about it when he told the surveyor.

The COURT.—I think this is wholly irrelevant. I think the plaintiff has put the witness on the stand for a specific purpose and I think it is proven whether the map is to be admitted in evidence. The map is admitted in evidence.

Mr. GRIGSBY.—Out objection is there is no evidence whatever tending to identify the map as a [126] map of the premises in controversy as claimed by plaintiff in his complaint and it is therefore immaterial; and the further objection the map is now ruled to be in evidence at a time when we are cross-examining a witness with reference to his competency and before we have closed our cross-examination.

Mr. COCHRAN.—We offer it and ask to have it marked Plaintiff's Exhibit 'A.'

The COURT.—All right."

To which ruling an exception was duly taken and allowed.

IV.

That the Court erred in overruling defendant's objection to the following testimony of Gus Johnson, a witness called on behalf of the plaintiff:

"Q. Now did you learn of a location notice at that time I don't care how, now, just generally, did you learn of a location notice of No. 32 for Windquist?

Mr. GRIGSBY.—Objected to as hearsay.

The COURT.—Overrule the objection."

To which ruling an exception was duly taken and allowed.

V.

That the Court erred in overruling defendant's objection to certain testimony of Gus Johnson, a witness called on behalf of the plaintiff, as follows:

"Mr. COCHRAN.—I offer the letter in evidence together with the translation.

Mr. GRIGSBY.—Objected to as incompetent, irrelevant, immaterial and self-serving.

The COURT.—Objection overruled." [127]

To which ruling an exception was duly taken and allowed.

VI.

The Court erred in striking out certain testimony of the witness H. C. Ames, the defendant, as follows: (H. C. Ames testifying.)

“I permitted him (referring to Gus Johnson) to work there (referring to the Kshunti *Faction*) on an agreement that he and I had. The agreement was to settle the line, the dispute of the line between his claim and mine. He said he had that power from Windquist. He agreed to settle the line at that time and we did establish a line. I can show it on the map there. (Witness traces a line across the map indicating the line agreed upon.) I said to Johnson ‘If you will settle this without any trouble I will give you that much of my claim’ and he said ‘Well there would not be much left’ and I said ‘It is only a difference of this corner and that is not much’ and he said ‘Well do that’ and I said ‘We will sink holes together next year with a boiler’ and he agreed to do it the next year. That was assessment work he was doing. I had my assessment work all done. Yes, we made that agreement with reference to this work. The holes that he sank there that year were about on the line that I just drew, the line we established as the line between his claim and mine. The agreement was that the next year, (I had a boiler and prospecting outfit) and I would furnish them and we would go in together and finish the holes. He dug the dirt down to the frost about three feet deep. It was about twelve or fifteen feet to bedrock. That was to be the assessment work on both claims for the next year if done in that manner, if we did it the next year.

Mr. COCHRAN.—I want to move at his time [128] to strike out all the evidence to this agreement because the same has not been coupled up or shown to be made, if made at all, with any authority from the owner of the claim.

(Argument.)

Mr. COCHRAN.—I am attempting to show the evidence offered by this witness is immaterial unless you can couple it up with the proper authority from the owner of the ground, Mr. Windquist.

Mr. GRIGSBY.—Now if the Court please, we are endeavoring to show exclusive possession of this ground ever since its location in 1903, and this witness has testified that nobody else has worked on Kshunti Fraction in any year since the location of it except 1911 and he only permitted the work to be done that year on account of an agreement made by him and the agent of Windquist to establish a boundary line. It is admissible whether or not it was binding on Windquist to show whether or not he suffered an agent or any owner of a conflicting location to work on his ground whether for the purpose designated by Cochran is admissible or not. I think it is admissible for that purpose because Windquist has testified he gave Johnson complete authority to do what he pleased with his claim. Johnson thereafter was his agent every year, did all the work that was done on the claim, Windquist never went with him; he could mine it, take anything out he could and

do as he pleased with it generally under that authority, up there miles from where Windquist was; when a dispute [129] arose he goes out and establishes a boundary line on the ground which is not a contract with reference to real estate that has to be done in writing. It is for the jury to say whether it is proof of an establishment of a boundary line or not. It is offered to show why he permitted Johnson to work on his fraction. (Argument.)

The COURT.—I will have to rule out the evidence.”

To which ruling an exception was duly taken and allowed.

VII.

The Court erred in sustaining plaintiff's objection to the following testimony of the defendant H. C. Ames:

“Q. What did Mr. Johnson say to this proposition when you made it to him

Mr. REED.—Objected to as not binding on the plaintiff or plaintiff's grantors unless the authority be in writing.

The COURT.—Objection sustained.”

To which ruling an exception was duly taken and allowed.

VIII.

The Court erred in sustaining plaintiff's objection to the following testimony offered on behalf of defendant by the defendant H. C. Ames:

“Mr. GRIGSBY.—Now we will again offer the matter stricken out, if the Court please.

We offer to prove the establishment of a boundary line in the summer of 1911 between the witness and Gus Johnson as agent for Windquist on the proof of agency already in evidence [130] and as a full establishment of a boundary line between those claims.

Mr. COCHRAN.—Objected to as incompetent and not binding upon the plaintiff or his grantors.

The COURT.—Objection sustained.”

To which ruling an exception was duly taken and allowed.

IX.

That the Court erred in overruling defendant's motion made after defendant and plaintiff rested and before the case was submitted to the Jury, as follows:

“Mr. LOMEN.—I move at this time for permission to file an amended and supplemental answer in this case alleging forfeiture of any claim known as No. 32 Above Allen's Discovery, if ever located, because of failure to do assessment work on the claim in 1911 and also in 1912. As far as the 1912 work is concerned, it is an alleged fact that occurred subsequent to the commencement of this action.

The COURT.—Motion overruled.”

To which ruling an exception was duly taken and allowed.

X.

That the Court erred in overruling the motion of the defendant that the Court direct the jury to re-

turn a verdict for the defendant as follows:

“Mr. LOMEN.—(After plaintiff and defendant had rested.) I, at this time, move that the Court direct the Jury to bring in a verdict for the defendant.

The COURT.—Motion overruled.”

To which ruling an exception was duly taken and allowed. [131]

XI.

That the Court erred in refusing to instruct the Jury as follows:

“You are hereby instructed to find a verdict in favor of the defendant.”

To which refusal an exception was duly taken and allowed.

XII.

The Court erred in refusing to give to the Jury the following instruction requested by defendant:

“If you find from the evidence that one Methe on or about the 10th day of January, 1902, took any steps toward locating, or did any act tending to locate the premises described in the complaint, or any part thereof, then I charge you that such step or steps, act or acts, if any, done by said N. Methe as the agent of any other person than the plaintiff N. O. Windquist, or in the name of another than the said plaintiff Windquist, did not inure to the benefit of the plaintiff Windquist and did not constitute any act of location on the part of said plaintiff Windquist; and I further charge you that then, and in that case, neither the said plaintiff Windquist

nor any other person acting for or on behalf of said Windquist, could appropriate said acts of said Methe, or any of them, as an act of location in the name of, or for the benefit of said Windquist; and I further charge you that if said Windquist performed any act or acts in order to perfect or necessary to perfect the location of the premises located, or attempted to be located by said Methe, with the intention [132] of perfecting the location made, or attempted to be made by said Methe, then said act or acts on the part of said Windquist would not operate as, or constitute an original location by Windquist or inure in any manner to the benefit of said Windquist unless you find that said Methe, in the matter of locating or attempting to locate, said premises, acted as the agent of Windquist and not as the agent of another.”

To the refusal of the Court to give such instruction the defendant excepted and exception was allowed.

XIII.

That the Court erred in refusing to give the following instructions requested by defendant.

“I further charge you that in Alaska it is not necessary to record any notice of location and that when a location is made for an absent locator, whether with or without his authority, or with or without his knowledge, whatever rights are given to him by such location, vest in him at once and even the person locating such absentee cannot take down the name of such absentee and

insert the name of another, either in the notices posted on the ground, if any, or in the certificate of location prepared for record, if any.”

To which refusal an exception was duly taken and allowed.

XIV.

That the Court erred in refusing to give to the jury the following instruction requested by the defendant:

“I further charge you that plaintiff, in order to [133] recover in this action, must prove the title alleged in the complaint, to wit: Title under a location made on or about the 10th day of January, 1902, notice of which location was recorded in volume 32 at page 170 of the records of the Kougarok Recording District, District of Alaska.”

To which refusal an exception was duly taken and allowed.

XV.

That the Court erred in denying the defendant's motion for a new trial as appears from the said motion incorporated in the Bill of Exceptions herein, to which order and ruling of the Court defendant then and there excepted and an exception was duly allowed by the Court.

WHEREFORE said defendant H. C. Ames, prays that the judgment of the said District Court for the District of Alaska, Second Division, be reversed and set aside.

IRA D. ORTON,
GEORGE B. GRIGSBY,
Attorneys for Defendant.

I hereby acknowledge the service of the above assignment of errors by receipt of copy this 30th day of October, 1915.

T. M. REED,
Of Attorneys for Plaintiff. [134]

[Endorsed]: No. 2372. In the District Court for the District of Alaska, Second Division. N. O. Windquist, now by Substitution Jerry Sullivan, Plaintiff, vs. H. C. Ames, Defendant. Assignment of Errors. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome, Oct. 30, 1914. G. A. Adams, Clerk. By ———, Deputy. George B. Grigsby, Attorney for Defendant. [135]

*In the District Court for the District of Alaska,
Second Division.*

No. —.

N. O. WINDQUIST, now by Substitution JERRY
SULLIVAN,

Plaintiff,

vs.

H. C. AMES,

Defendant.

Petition for Writ or Error.

The defendant in the above-entitled action, feeling himself aggrieved by the verdict of the jury and the judgment entered on the 9th day of January, 1915, in said action, comes now by George B. Grigsby and Ira D. Orton, his attorneys and petitions the above court for an order allowing said

defendant to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in the above-entitled court *to* be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit. And your petitioner will every pray.

IRA D. ORTON,
GEORGE B. GRISBY,
Attorney for Defendant.

[Endorsed]: #2372. In the District Court for the District of Alaska, 2d Division. N. O. Windquist, now by Substitution Jerry Sullivan, Plaintiff vs. H. C. Ames, Defendant. Petition for Writ of Error. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 30, 1915. G. A. Adams, Clerk. By ———, Deputy. George B. Grigsby, Attorney for Defendant [136]

*In the District Court for the District of Alaska,
Second Division.*

No. —.

N. O. WINDQUIST, now by Substitution JERRY
SULLIVAN,

Plaintiff,

vs.

H. C. AMES,

Defendant.

Undertaking on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, H. C. AMES, as principal, and T. H. Evans
and D. W. Johnston, as sureties, are held and firmly
bound unto Jerry Sullivan, the plaintiff above-
named in the sum of Two Hundred Fifty (\$250)
Dollars to be paid to the said Jerry Sullivan, his
heirs, executors, administrators or assigns, to the
payment of which well and truly to be made we
bind ourselves, and each of us, jointly and severally,
and our and each of our heirs, executors, adminis-
trators and assigns, firmly by these presents.

Sealed with our seals and dated this 30th day of
October, 1915.

The condition of the obligation is that,

WHEREAS, the above-named defendant, H. C.
Ames has sued out a writ of error to the United
States Circuit Court of Appeals for the Ninth Cir-
cuit to reverse the judgment in the above-named
cause rendered by the District Court of the Dis-
trict of Alaska, Second Division:

NOW, THEREFORE, if the above-named H. C. Ames shall prosecute said writ to effect and answer and pay all costs if he fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

H. C. AMES.

(Principal)

T. H. EVANS.

D. W. JOHNSTON. (Sureties) [137]

United States of America,
Territory of Alaska,—ss.

T. H. Evans and D. W. Johnston, being duly sworn, each for himself and not one for the other, deposes and says:

That he is a resident of the District of Alaska, and one of the sureties above mentioned; that he is not a counselor or attorney at law, marshal deputy marshal, commissioner, clerk of any court, or other officer of any court; that he is worth the sum of Two Hundred Fifty (\$250) Dollars over and above all just debts and liabilities and exclusive of property exempt from execution.

T. H. EVANS.

D. W. JOHNSTON.

Subscribed and sworn to before me this 30th day of October, 1915.

[Seal]

D. B. CHACE,

Notary Public for the Territory of Alaska, residing
at Nome.

(My commission expires May 12th, 1917.)

The foregoing bond on Writ of Error presented

and approved in open court this 30th day of October, 1915.

J. R. TUCKER,
District Judge. [138]

[Endorsed]: #2372. In the District Court for the District of Alaska, 2d Division. N. O. Windquist, now by Substitution Jerry Sullivan, Plaintiff vs. H. C. Ames, Defendant. Undertaking on Writ of Error. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome, Oct. 30, 1915. G. A. Adams, Clerk. By ———, Deputy. [139]

*In the District Court for the District of Alaska,
Second Division.*

No. —.

N. O. WINDQUIST, now by Substitution JERRY
SULLIVAN,

Plaintiff,

vs.

H. C. AMES,

Defendant.

Order Allowing Writ of Error.

Upon the motion of George B. Grigsby, attorney for the defendant in the above-entitled action, and upon filing a petition for a writ of error together with assignment of errors, it is hereby

ORDERED that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein and that the

amount of bond on said writ of error be, and is hereby fixed at Two hundred fifty Dollars (\$250) said bond to operate as a cost bond.

Done in open court this 30th day of October, 1915.

J. R. TUCKER,

District Judge.

[Endorsed]: #2372. In the District Court for the District of Alaska, 2d Division. N. O. Windquist, now by Substitution Jerry Sullivan, Plaintiff vs. H. C. Ames, Defendant. Order Allowing Writ of Error. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 30, 1915. G. A. Adams, Clerk. By _____, Deputy. George B. Grigsby, Attorney for Defendant. [140]

*In the District Court for the District of Alaska,
Second Division.*

No. —.

N. O. WINDQUIST, now by Substitution JERRY
SULLIVAN,

Plaintiff,

vs.

H. C. AMES,

Defendant.

Writ of Error (Lodged Copy.)

The President of the United States, to the Honorable J. R. TUCKER, Judge of the District Court for the District of Alaska, Second Division:

Because in the records and proceedings, as also

in the rendition of the judgment of a plea which is in the said District Court for the District of Alaska, Second Division, before you, between H. C. Ames, plaintiff in error, and Jerry Sullivan, defendant in error, a manifest error hath happened to the great damage of the said H. C. Ames, plaintiff in error, as by the complaint appears.

We, being willing that error, of any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 29th day of November, 1915, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error what of right according to [141] the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States this 30th day of October, in the year of our Lord one thousand nine hundred and fifteen and of

our Independence the one hundred and fortieth.

[Seal]

G. A. ADAMS,

Clerk of the District Court, District of Alaska, Second Division.

Allowed by:

J. R. TUCKER,

District Judge.

[Endorsed]: #2372. In the District Court for the District of Alaska, 2d Division. N. O. Windquist, now by Substitution Jerry Sullivan, Plaintiff vs. H. C. Ames, Defendant. Writ of Error (Lodged Copy). Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 30, 1915. G. A. Adams, Clerk. By _____, Deputy. Geo. B. Grigsby, Attorney for Defendant. [142]

*In the District Court for the District of Alaska,
Second Division.*

No. —.

N. O. WINDQUIST, now by Substitution JERRY
SULLIVAN,

Plaintiff,

vs.

H. C. AMES,

Defendant.

Order Enlarging Time to File Record.

On motion of George B. Grigsby, counsel for defendant, the time for filing the record in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit is hereby extended

to and until the 10th day of December, 1915.

Done in open court this 30 day of October, 1915.

J. R. TUCKER,

District Judge.

[Endorsed]: #2372. In the District Court for the District of Alaska, 2d Division. N. O. Windquist, now by Substitution Jerry Sullivan, Plaintiff vs. H. C. Ames, Defendant. Order Enlarging Time to File Record. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 30, 1915. G. A. Adams, Clerk. By _____, Deputy. George B Grigsby, Attorney for Defendant. [143]

*In the District Court for the District of Alaska,
Second Division.*

No. —.

N. O. WINDQUIST, now by Substitution JERRY
SULLIVAN,

Plaintiff,

vs.

H. C. AMES,

Defendant.

Praeipie for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please make transcript of the following papers on file herein: All pleadings, verdict, motion for new trial, judgment, bill of exceptions, order extending time to settle bill of exceptions, assignment of errors, petition for writ of error, order

allowing writ of error, bond on writ of error, lodged copy of writ of error, order extending time to docket case, and other appeal papers, the original writ of error and original citation to be attached.

GEORGE B. GRIGSBY,

IRA D. ORTON,

Attorneys for Defendant.

[Endorsed]: #2372. In the District Court for the District of Alaska, Second Division. N. O. Windquist, now by Substitution Jerry Sullivan, Plaintiff vs. H. C. Ames, Defendant. Praeceptum for Transcript of Record. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 30, 1915. G. A. Adams, Clerk. By _____, Deputy. [144]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court for the District of Alaska,
Second Division.*

No. —.

N. O. WINDQUIST, now by Substitution JERRY
SULLIVAN,

Plaintiff,

vs.

H. C. AMES,

Defendant.

I, G. A. Adams, Clerk of the District Court of Alaska, Second Division, do hereby certify that the

foregoing typewritten pages, from 1 to 144, both inclusive, are a true and exact transcript of the Complaint, Answer, Reply, (being all the pleadings) Instructions to the Jury, Verdict, Motion for New Trial, Affidavit of G. J. Lomen in Support of Motion for New Trial, Court Minutes Jan. 2, 1915 (Denying Motion for New Trial), Judgment, Court Minutes, July 3, 1915, (Continuing Settlement Bill of Exceptions) Proposed Bill of Exceptions, Order Settling Bill of Exceptions, Assignment of Errors, Petition for Writ of Error, Undertaking on Writ of Error, Order Allowing Writ of Error, Writ of Error, (Lodged Copy), Order Enlarging Time to File Record and Praeipie for Transcript of Record in the case of N. O. Windquist, now by substitution Jerry Sullivan, Plaintiff, vs. H. C. Ames, Defendant, No. 2372 this court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; and further certify that the Original Writ of Error and Original Citation in the above-entitled cause are attached to this transcript.

Cost of transcript \$61.85, paid by George B. Grigsby of attorneys for defendant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 3d day of November, A. D. 1915.

[Seal]

Clerk. [145]

*In the District Court for the District of Alaska,
Second Division.*

No. —

N. O. WINDQUIST, now by Substitution JERRY
SULLIVAN,

Plaintiff,

vs.

H. C. AMES,

Defendant.

Writ of Error (Original)

The President of the United States, to the Honorable J. R. TUCKER, Judge of the District Court for the District of Alaska, Second Division:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court for the District of Alaska, Second Division, before you, between H. C. Ames, plaintiff in error, and Jerry Sullivan, defendant in error, a manifest error hath happened to the great damage of the said H. C. Ames, plaintiff in error, as by the complaint appears.

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, to-

gether with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 29th day of November, 1915, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error what of right [146] according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States this 30th day of October, in the year of our Lord one thousand nine hundred and fifteen and of our Independence the one hundred and fortieth.

[Seal]

G. A. ADAMS,

Clerk of the District Court, District of Alaska,
Second Division.

Allowed by:

J. R. TUCKER,

District Judge. [147]

*In the District Court for the District of Alaska,
Second Division.*

No. —

N. O. WINDQUIST, now by Substitution JERRY
SULLIVAN,

Plaintiff,

vs.

H. C. AMES,

Defendant.

Citation (Original)

The President of the United States of America, to
Jerry Sullivan and to O. D. Cochran and T. M.
Reed, His Attorneys:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, within the State of California, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court for the District of Alaska, Second Division, in the above-entitled cause wherein H. C. Ames is plaintiff in error and Jerry Sullivan is defendant in error, to show cause, if any there be why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 30th day of October, A. D. 1915, and of the Independence of the United States the one hundred and fortieth.

J. R. TUCKER,
District Judge.

Attest my hand and the seal of the United States District Court for the District of Alaska. Second Division, at the clerk's [149] office at Nome,

Alaska, the day and year last above written.

[Seal]

G. A. ADAMS,
Clerk of the District Court for the District of
Alaska, Second Division.

Received copy this 30th day of October, 1915.

Of O. D. COCHRAN,
Attorney for Plaintiff. [150]

[Endorsed]: No. 2682. United States Circuit
Court of Appeals for the Ninth Circuit. H. C. Ames,
Plaintiff in Error, vs. Jerry Sullivan, Defendant in
Error. Transcript of Record. Upon Writ of Error
to the United States District Court of the District
of Alaska, Second Division.

Filed November 16, 1915

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit

By MEREDITH SAWYER,
Deputy Clerk.

2682

NO. 2622

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

H. C. AMES,
Plaintiff in Error,

vs.

JERRY SULLIVAN,
Defendant in Error.

}

ERROR TO THE DISTRICT COURT FOR THE
DISTRICT OF ALASKA, SECOND
DIVISION

Brief of Plaintiff in Error

GEORGE B. GRIGSBY,
Nome, Alaska,

THOMAS R. LYONS and IRA D. ORTON, APR 26 1915
918-922 Alaska Building, Seattle, Washington,
Attorneys for Plaintiff in Error.

NO. 2622

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

H. C. AMES,

Plaintiff in Error,

vs.

JERRY SULLIVAN,

Defendant in Error.

}

ERROR TO THE DISTRICT COURT FOR THE
DISTRICT OF ALASKA, SECOND
DIVISION

Brief of Plaintiff in Error

GEORGE B. GRIGSBY,

Nome, Alaska,

THOMAS R. LYONS and IRA D. ORTON,

918-922 Alaska Building, Seattle, Washington,

Attorneys for Plaintiff in Error.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

H. C. AMES,	}
<i>Plaintiff in Error,</i>	
<i>vs.</i>	
JERRY SULLIVAN,	}
<i>Defendant in Error.</i>	

ERROR TO THE DISTRICT COURT FOR THE
DISTRICT OF ALASKA, SECOND
DIVISION

Brief of Plaintiff in Error

STATEMENT.

This action was brought in the court below by N. O. Windquist against H. C. Ames, the plaintiff in error herein, to recover possession of a placer claim in the Kougarok District, Territory of Alaska, described as No. 32 Above Allen's Discovery, on the Kougarok River. The Complaint contained allegations of ownership in general terms and alleged an

ouster by Ames, defendant in the court below (Tr. pp. 1-2). The plaintiff in error, in his answer, sets up title to a portion of the premises sued for, claiming under the location of a claim called the "Kshunti Fraction", location of which is alleged to have been made July 25th, 1903, by one G. J. McLean (Tr. pp. 4-5). A half interest in this claim, "Kshunti Fraction", is alleged to have been conveyed to Ames, by deed in writing, and it is further alleged that ever since July 25th, 1903, Ames and McLean have owned and still own said "Kshunti Fraction" (Tr. p. 5). Before the trial, Jerry Sullivan, grantor of N. O. Windquist, was substituted as plaintiff in the place and stead of said Windquist (Tr. p. 25).

To sustain the issues on his part, plaintiff in the court below produced four witnesses, George J. McLean, N. O. Windquist, Gus Johnson and the substituted plaintiff, Jerry Sullivan. Their testimony is set forth in full in the transcript, pages 25 to 59. The witness McLean was called to identify a map of the premises in dispute, made by him from a survey made in June, 1912 (Tr. p. 25). From his testimony it appears that McLean knew nothing of the location prior to making a survey in order to prepare the map. McLean says:

"I made the map under the direction of Gus Johnson. He pointed out the stakes to me, I never

knew them before that time.” (Tr. p. 27).

The map was introduced in evidence, and appears at page 32 of the Transcript.

Gus Johnson testified that he pointed out the stakes to McLean at the time the survey was made. He testified that he saw the original stakes in 1902, was back in 1904, and the original stakes were gone, and he put up new ones (Tr. p. 28). In 1902 he saw a notice of location on the claim, and it had “N. O. Windquist Agent” on it (Tr. p. 29). At this point the plat having been introduced in evidence, N. O. Windquist, the original plaintiff in the case was called as a witness. He testified that in 1902 one Captain Kennedy showed him two location notices, saying “I have located two claims for you”. Windquist testified further that the location notice was signed with his (Windquist’s) name as locater, and Mr. Methe, as agent, and Tom Evans, as a witness, and that he, Windquist, never had been on the ground until after it was located (Tr. pp. 33-34). A copy of the location notice, as recorded, was introduced in evidence, (Tr. p. 35) reading as follows:

“PLACER LOCATION NOTICE

Know all men by these presents that I, the undersigned, have this day in accordance with the laws of the United States of America and the local rules and regulations and being otherwise legally entitled so to do, located and claim for placer mining purposes the

following described tract of land situated on Kougarok River in Kougarok Mining District, District of Alaska, being a portion of otherwise unoccupied Public Domain and situated for mining purposes only, to-wit:

Commencing at the intial stake being the lower center end stake and upon which a true copy of this notice is posted; thence in a Northerly direction as near as practicable at right angles to the general course of the stream 330 feet to corner stake No. 1, thence at right angles in a Westerly direction up stream as near as practicable parallel to the general course thereof 1320 feet to corner stake No. 2; thence in a Southerly direction at right angles 330 feet to the upper center end stake, thence continuing on the same line 330 feet to corner stake No. 3; thence at right angles in an Easterly direction down stream as near as practicable to the general course thereof 1320 feet to corner stake No. 4; thence at right angles 330 feet to the place of beginning, being the initial stake.

This claim shall be known as No. 32 Above Allen's Discovery on Kougarok River.

Located this ten day of January, A. D. 1902, in the presence of the undersigned witnesses.

N. O. WINDQUIST, Locator.

By N. METHE, Agent."

Witness: T. H. EVANS.

Filed for record 1 p. m. Mar. 29, 1902.

LARS GUNDERSON,

Recorder.

The witness Windquist continued testifying (Tr. pp. 36-44) in relation to having gone on the claim after its alleged location, for him, discovered gold, and his employment of Gus Johnson to work on the claim, and other matters tending to establish the location claimed by him.

Gus Johnson was recalled (Tr. p. 44). His testimony tended to corroborate Windquist. Johnson however was not on the claim until after it was located. Among other things the witness Johnson testified that in 1912 he was working on No. 32 and the defendant Ames put him off and that the assessment work for Windquist was not done for that year (Tr. p. 50). On re-direct examination the witness Johnson testified *inter alia* as follows (Tr. pp. 50-52) :

“When I went to do the assessment work on this claim in 1912, it was after the commencement of this action. I had Brose with me to help me. Mr. Ames claimed to be in possession of all of claim No. 32. He said so. He told me to get off the claim if I wanted to keep out of trouble. ‘Get off the ground’, he said. I guess he was referring to claim No. 32. It was in the fall of the year 1912 that I attempted to do the assessment work on No. 32 in November. Ed Brose was with me. We worked one day close to the line of the Kshunti Fraction and the next day Ames would not let us work. The conversation between Ames and I took place on No. 32 in the hole where I was working. He told me to get out of there, that he would see that I did get out and took hold of me. I wrote Windquist about the affair. (Letter shown to witness). Yes that is the original letter I wrote to Windquist at that time on the 30th of November, 1912. It is in the Swedish language. (Witness shown translation of letter into the English language.) Yes that is a translation of the letter.

MR. COCHRAN—I offer the letter in evidence together with the translation.

MR. GRIGSBY—Objected to as incompetent, irrelevant and immaterial and self-serving. We

move that it be stricken out and that the jury be instructed to disregard it as self-serving and hearsay.

Motion denied. Letter admitted in evidence and marked Plaintiff's Exhibit 'C', to which ruling defendant then and there excepted and exception allowed."

The translation of said letter so admitted in evidence was as follows:

"Taylor, Alaska, November 30, 1912.

I have been up on No. 32 and done some work but Ames did not want me to work there. We had a little trouble. He was after me every day but to-day he came and threatened me with violence and I left as I did not wish to be pounded to death. He said that he would win that claim if he had to kill a number of persons so I did not wish to take any further chances and I left. You can go and see Reed about what we shall do.

Yours,
GUS JOHNSON."

Jerry Sullivan, called as a witness in his own behalf, as substituted plaintiff, identified copy of deed to him from Windquist, of the premises in dispute, dated in 1914. He did not testify as to any facts relating to the location of the claim (Tr. pp. 55-59).

The foregoing is, in our opinion, a full and fair statement of the evidence for plaintiff concerning the location of No. 32, for the original plaintiff, Windquist.

The defendant first offered in evidence the deposition of N. Methe, the identical person who is claimed by plaintiff to have located the premises in dis-

pute for Windquist. Methe, who is a disinterested witness, residing in New Bedford, Mass., testified fully and positively that he did not locate the claim for Windquist, but that he did at the time mentioned locate the claim for one Heinze (Tr. p. 60), that Evans assisted him and witnessed the location notice (Tr. pp. 61-62), and that he sent the location notice to the Recorder by Captain Kennedy (Tr. p. 62). The following questions and answers are found in the deposition of the witness Methe: (Tr. pp. 62-63).

“Q. Whose name, if any one, was given in said notice as locator and what name as a witness and what name as agent for the locator?

A. Heinze as locator, T. H. Evans as witness, and N. Methe as agent.

* * * * *

Q. If, in answer to a previous interrogatory, you have stated that you gave the location notice of No. 32 Above Allen's Discovery to J. C. Kennedy to be recorded, state whether or not you authorized him at any time to make any change in said location notice with reference particularly to changing the name of the locator named therein.

A. I never authorized such a change.

Q. Did you ever authorize him to substitute the name of N. O. Windquist for the name of _____ Heinze in said notice?

A. No, I never authorized him to change name.

Q. Did you ever, at any time, locate any claim on the Kougarok River for N. O. Windquist?

A. No.”

T. H. Evans was also called and sworn as a witness and he corroborates Methe to the effect that No. 32, the premises in question, was not located in the name of or for Windquist, but for one Heinze. His testimony appears, commencing at page 73 of the transcript, and is positive and direct. He describes fully the location of the claim by Methe for Heinze, and the drawing up of the location notice and the fact that he witnessed the notice (Tr. p. 75). The witness Evans testified that he and Methe discovered gold on No. 32 prior to its location for and in the name of Heinze (Tr. p. 81).

H. C. Ames, the defendant in the court below, testified in his own behalf (Tr. pp. 87-111). He described fully and accurately the location of the Kshunti Fraction, in 1903, the marking of the boundaries and discovery of gold thereon. The boundaries of the Kshunti Fraction, he states, are approximately correctly shown on the map introduced by plaintiff (Tr. p. 87). His original location notice was introduced in evidence. It appears by the endorsements to have been recorded in 1908, but it is evident that this is a mistake. It was recorded in 1903 (Tr. p. 106). The deed, conveying a one-half interest in the claim to Ames, executed in 1905, was introduced in evidence (Tr. p. 91). Ames testified as to the work done on his fraction as follows: (Tr. p. 94).

“Since 1904 I have performed the annual labor on the Kshunti Fraction and have done from two to six hundred dollars worth of work every year since. I have sunk more than twenty odd holes to bedrock, twenty-seven I think it was, besides drifting.”

Ames admitted driving Johnson off the fraction in 1912, but denies the threats of killing, or that he ever drove Johnson off that part of No. 32 not in conflict with the fraction. The witness testified:

“I went over there and drove Cayuse Johnson off the claim. I did not tell him at that time I was going to have that claim if I had to kill everybody in Kougarok. I drove him off the Kshunti Fraction. I did not at that time assert any title to the rest of No. 32 as shown on that map, nor put any body off from there. I have never tried to prevent their doing work on the balance of No. 32.” (Tr. p. 98).

Ed Moran, who witnessed the location of the Kshunti Fraction, testified for defendant in the court below and fully corroborates Ames as to the location of the claim (Tr. pp. 111-112).

Captain Kennedy referred to in the evidence died some time prior to the year 1912 (Tr. p. 114).

At the close of the evidence, the defendant's counsel made the following Motion (Tr. p. 118):

“MR. LOMEN.—I move at this time for permission to file an amended and supplemental answer in this case alleging forfeiture of any claim known as No. 32 Above Allen's Discovery, if ever located because of failure to do assessment work on the claim in 1911 and also in 1912. As far as the 1912 work is concerned it is an alleged fact that occurred subse-

quent to the commencement of this action.”

This Motion was denied, and exception reserved (Tr. p. 118).

The jury returned a verdict for plaintiff, upon which judgment was entered. And defendant thereupon sued out this Writ of Error.

SPECIFICATION OF ERRORS.

I.

The Court erred in overruling defendant's objection to the following testimony of George J. McLean, a witness produced for the plaintiff, as follows: (George J. McLean testifying).

“After I heard that the Kshunti Fraction had been located, I had a conversation with Mr. Ames with reference to it.

Q. What did you tell him?

MR. LOMEN.—Objected to as immaterial.

THE COURT.—Overrule the objection.

To which ruling an exception was duly made and allowed.

A. I told him, I said, ‘You had better cut this fraction business out.’ I said, ‘I will have nothing to do with a claim that is jumped.’

MR. LOMEN.—Move that the answer be stricken out.

THE COURT.—Overrule motion.

To which ruling an exception was duly made and allowed.

II.

The Court erred in overruling defendant's objection to the following testimony of George J. McLean, a witness produced on behalf of the plaintiff, as follows: (Witness testifying).

“I was requested several years ago by Mr. Windquist to make a survey of this ground.

Q. What was the survey to be made for?

MRR. GRIGSBY.—Objected to as immaterial and self-serving.

THE COURT.—Objection overruled.

To which ruling an exception was taken and allowed.

“A. I was instructed to survey No. 32 by Mr. Windquist. He told me that his claim had been jumped.”

III.

The Court erred in admitting in evidence plaintiff's Exhibit “C”, being the letter of Gus Johnson to N. O. Windquist, the translation of which reads as follows:

“Taylor, Alaska, November 30, 1912.

I have been up on No. 32 and done some work, but Ames did not want me to work there. We had a little trouble. He was after me every day but today he came and threatened me with violence and I left as I did not wish to be pounded to death. He said he would win that claim if he had to kill a number of persons so I did not wish to take any further chances

and I left. You can go and see Reed about what we shall do.

Yours,
GUS JOHNSON."

IV.

The Court erred in overruling defendant's motion made after defendant and plaintiff rested, and before the case was submitted to the Jury, as follows:

"MR. LOMEN.—I move at this time for permission to file an amended and supplemental answer in this case alleging forfeiture of any claim known as No. 32 Above Allen's Discovery, if ever located, because of failure to do assessment work on the claim in 1911 and also in 1912. As far as the 1912 work is concerned, it is an alleged fact that occurred subsequent to the commencement of this action.

THE COURT.—Motion overruled."

To which ruling an exception was duly taken and allowed.

ARGUMENT

I.

THE TRIAL COURT ADMITTED INCOMPETENT EVIDENCE, PARTICULARLY THE LETTER OF THE WITNESS GUS JOHNSON TO N. O. WINDQUIST. THESE ERRORS WERE PREJUDICIAL FOR WHICH THE JUDGMENT SHOULD BE REVERSED.

While the witness, Gus Johnson, was on the stand testifying for plaintiff as to what he did on No.

32, the claim in dispute, in the year 1912, and had detailed how the plaintiff in error, Ames, had put him off the ground, he testified as follows:

“I wrote Windquist about that affair. (Letter shown witness.) Yes, that is the original letter I wrote Windquist at that time, on the 30th of November, 1912. It is in the Swedish language. (Witness shown translation of the letter into the English language.) Yes, that is the translation of the letter.

MR. COCHRAN.—I offer the letter in evidence together with the translation.

MR. GRIGSBY.—Objected to as incompetent, irrelevant, and immaterial and self-serving. We move that it be stricken out and that the jury be instructed to disregard it as self-serving and hearsay.

Motion denied. Letter admitted in evidence and marked Plaintiff’s Exhibit “C”, to which ruling defendant then and there excepted and exception allowed.”

The translation of said letter, so admitted in evidence, was as follows:

Taylor, Alaska, November 30, 1912.

I have been up on No. 32 and done some work but Ames did not want me to work there. We had a little trouble. He was after me every day but today he came and threatened me with violence and I left as I did not wish to be pounded to death. He said that he

would win that claim if he had to kill a number of persons so I did not wish to take any further chances and I left. You can see Reed about what we shall do.

Yours,

GUS JOHNSON."

We respectfully submit that the court, in admitting this letter, committed error for which the judgment should be reversed. It can hardly be disputed that the letter is mere hearsay and incompetent. The statement in this letter saying, "He said he would win the claim if he had to kill a number of persons, so I did not wish to take any further chances and I left", is not testified to by the witness Johnson in any manner except by the mere introduction of the letter from the witness to Windquist. To charge by hearsay evidence that one of the parties to the suit threatened to commit several murders in order to win the lawsuit constitutes, we urge, most material error.

Under no view of the case could such an error be considered immaterial. It is well settled in this Court, that:

"Material evidence erroneously admitted in a trial before a jury is always reversible error, unless it can be properly said that such admission was, without doubt, without injury."

United States v. Honolulu Plantation Co., 122 Fed., 581, 583 (*Citing: Mexia v. Oliver*, 148 U. S. 664,

13 Sup. Ct. 754, 37 L. Ed. 602; *Boston & Albany R. R. Co. v. O'Reilly*, 158 U. S. 334, 15 Sup. Ct. 830, 39 L. Ed. 1006; *V. & M. R. R. Co. v. O'Brien*, 119 U. S., 99, 7 Sup. Ct., 172, 30 L. Ed. 299; *Gilmer v. Higley*, 110 U. S. 47, 3 Sup. Ct. 471, 28 L. Ed. 62; *National M. Association v. Shryock*, 20 C. C. A. 3, 73 Fed. 774; *St. Louis, etc. Ry. Co. v. Needham*, 11 C. C. A. 56, 63 Fed. 107, 25 L. R. A. 833).

In the case at bar the evidence preponderates in favor of the plaintiff in error, or at the most is conflicting and equally balanced. It was therefore particularly important that no errors be committed in allowing incompetent evidence to be introduced.

The only two persons who were present when the location was made, under which plaintiff claims, were the witnesses Methe and Evans, and they both testify positively that the location was not made for or in the name of Windquist, but for and in the name of one Heinze. (Tr. pp. 60, 64, 74, 80, 81).

The Court is earnestly requested to carefully read the Deposition of the witness Methe (Tr. pp. 59-71). In the most favorable aspect for the defendant in error the evidence can only be said to be conflicting and evenly balanced. In such a case it is most important that no prejudicial errors be made in evidence admitted. The case in this respect is very like the case of *Leedy v. Lehfelt*, reported in 162 Fed.,

p. 304, where a case very similar to the one at bar was reversed by this Court because of an error in the Court in admitting in evidence a very brief note or letter, written by one of the parties, which was held to be inadmissible. The Court, in *Leedy v. Lehfelt*, *supra*, referring to the letter in question, says, at page 163:

“It was not a very important or conclusive item of evidence, but in a case where, as in this, a clearly defined issue of fact was presented, and the evidence was directly contradictory, and nearly evenly balanced, it may readily be seen that such evidence, received for the purpose for which it was offered, and admitted under the sanction of the court, unaccompanied by any charge to the jury as to its probative value, may have been determinative in the minds of the jury in solving the question as to where the preponderance of the evidence lay.”

This brief could be extended by an exhaustive and minute discussion of the evidence to show how strongly it preponderates in favor of the plaintiff in error, but the number of the witnesses is so few, and the record of the whole evidence so comparatively short, that we feel justified in asking the Court to read the entire evidence in order to form a just and fair conclusion on this point.

The evidence set forth in the specifications of error Nos. one and two, (Tr. pp. 26-27), was also hearsay, and we think clearly inadmissible for the reasons

already urged, and affords additional reason for the reversal of the Judgment.

II.

THE COURT ERRED IN OVERRULING THE MOTION OF THE PLAINTIFF IN ERROR FOR LEAVE TO FILE AN AMENDED AND SUPPLEMENTAL ANSWER.

At the close of all the evidence, counsel for plaintiff in error made the following Motion: (Tr. p. 118).

“MR. LOMEN.—I move at this time for permission to file an amended and supplemental answer in this case alleging forfeiture of any claim known as No. 32 Above Allen’s Discovery, if ever located, because of failure to do assessment work on the claim in 1911 and also in 1912. As far as the 1912 work is concerned it is an alleged fact that occurred subsequent to the commencement of this action.”

This Motion was overruled, to which defendant duly excepted, and assigns and specifies the same as error. (Tr. p. 149).

There were no issues made by the pleadings as to the assessment work for the year 1912 as the issues were made up before the end of that year (Tr. pp. 7-8.) However, evidence was admitted without objection that the assessment work was not done for the year 1912 (Tr. pp. 50-51). It is true that Johnson testified that the plaintiff in error Ames run him off the claim (Tr. p. 50), but this Ames positively denies. Ames testified on this point as follows:

“I drove him off the Kshunti Fraction. I did not at that time assert any title to the rest of that No. 32 as shown on that map, nor put anybody off from there. I never tried to prevent their doing work on the balance of No. 32.”

If the assessment work was not done on No. 32 in 1912, the plaintiff's title automatically lapsed and became void.

Thatcher v. Brown, 190 Fed., 708.

It having been disclosed by the evidence introduced without objection that the assessment work for the year 1912 was in fact not performed by plaintiff's grantor, it was the clear duty of the court to allow defendant in the court below to file an amended and supplemental answer setting up this fact.

Compiled Laws of Alaska, Sections 924, 930;
Carter's Code, Sections 92 and 98.

In the case of *Ebner v. Alaska Juneau Gold Mining Co.*, 210 Fed., 599, this Court approved of an order which permitted the defendant to amend its answer after the close of the trial in order to set up failure to perform assessment work. The Court there said:

“The action of the court in allowing such an amendment was clearly within the exercise of sound discretion. Carter's Alaska Code, Pt. 4, Sec. 92.”

In the case at bar we submit the court below did not properly exercise this sound discretion and its

action is subject to review and correction by this Court.

Section 924 of the Compiled Laws of the Territory of Alaska (Carters Code, pt. 4, Sec. 92) was taken verbatim from the laws of Oregon.

1 Hills Annotated Laws of Oregon, Sec. 101, p. 241.

Prior to the enactment of this section of the laws of Oregon into the Code of Alaska the Supreme Coure of Oregon had spoken conclusively on this subject. In *Cook v. Criosan*, 36 Pac., 532, that Court held, quoting the language of the Syllabus:

“Where theevidence is received without objection as to material matters set not set up in the pleadings, a refusal of leave to amend so as to conform the pleadings to the real issue tried, is reversible error.”

In discussing this question, the Oregon Court says:

“The power of the court to allow amendments is not entirely discretionary. It is granted to advance justice, and should be exercised liberally, in proper cases. The parties in this case were before the court, and introduced their evidence upon the real point in controversy between them, without objection. Under such circumstances when the trial court refused to allow the defendant to amend his answer so as to conform to the facts proved and litigated, thereby excluding such evidence from the consideration of the jury, its action injuriously affected the substantial rights of the defendant, and constituted a reversible error.”

The rule adopted by the Federal Courts is the same. In the case of *United States v. Lehigh Valley Railroad Company*, 222 U. S., 257; 31 Sup. Ct. Rep. 387, the Supreme Court of the United States reversed the decision of the lower Court for an “abuse of discretion” in refusing leave to amend complainants bill.

In *Owl Creek Coal Co. v. Goleb*, 210 Fed., 209 (C. C. A.) one of the reasons given for the reversal of the judgment was the error of the trial court in refusing to permit amendments to the answer.

The rule of this Court is fully stated in *Coer D’Alene Lumber Co. v. Thompson*, 215 Fed., 8-15, where it is distinctly stated that the discretion of the trial court in permitting or refusing amendments is subject to review in proper cases of the abuse of this discretion.

Morrow, Circuit Judge in the case last cited, quotes from *McDonald v. Nebraska*, 101 Fed., 171-176 (C. C. A.) as follows:

“The right and duty of the federal courts to allow amendments does not rest on state statutes only. It is conferred on them by the Judiciary Act of 1789. That act was framed by the great statesmen and lawyers who had actively participated in the struggle to establish the political independence of their country. When this object had been achieved, and the Constitution adopted, they framed an act for the organization and government of the national courts

which has remained for more than a century a monument of their great wisdom, foresight, and sense of justice. The thirty-second section of that act (now section 954 of the Revised Statutes) was designed to free the administration of justice in the federal courts from all subtle, artificial and technical rules and modes of proceeding in any way calculated to hinder and delay the determination of causes in those courts upon their very merits. This act emancipated the judicial department of the government from the shackles of artificial and technical rules, which had theretofore been interposed to obstruct the administration of justice, as completely as the Revolution had emancipated the political department of the government from foreign domination. This was done by investing the federal courts with plenary power to remove by amendment all such impediments to the attainment of justice."

Under this just and liberal rule, we think the court below committed error in not permitting the amendment to the answer to conform to proofs admitted without objection.

For the reason stated a reversal of the judgment is asked.

Respectfully submitted.

GEORGE B. GRIGSBY,

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2682

No. 2622.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

H. C. AMES,

Plaintiff in Error,

vs.

JERRY SULLIVAN,

Defendant in Error.

ERROR TO THE DISTRICT COURT FOR THE DIS-
TRICT OF ALASKA, SECOND DIVISION.

BRIEF OF DEFENDANT IN ERROR.

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Filed this.....day of May, 1916.

....., Clerk.

By.....Deputy Clerk.

The James H. Barry Co.,
San Francisco

Filed

MAY 7 2 1916

F. D. Monckton,

IN THE
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Defendant in Error.

ERROR TO THE DISTRICT COURT FOR THE DIS-
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BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

Defendant in error has nothing of importance to complain of in connection with the statement of facts of plaintiff in error in his brief, except as to the statement on page 8 of the brief to the effect that H. C. Ames, plaintiff in error "described fully and accurately the location of the Kshunti Fraction."

From the record made, it is most uncertain where the boundaries of the Kshunti Fraction were, though according to the location notice (Tr., 89) the claim contained about eighteen acres and its lower end joined the upper end of the claim known as Number 31 above

Allen's Discovery. In the testimony of Ames (Tr., 107) he stated:

"At the time I located the Kshunti Fraction, I did not know that the location of that identical ground was recorded in the name of Windquist. I did not at that time know there was any number 32. I was told by the man who was there and helping locate these claims that there was no 32."

And again (Tr., 106):

"I knew that Tom Evans had located Number 8. I had never heard that Evans and Methe had located Number 32. I knew they had located up as far as Number 31. I thought they had left Number 32 vacant."

And again (Tr., 88):

"The upper corner of Number 31 was at my initial stake."

The testimony of Methe and Evans, witnesses for defendant below, was to the effect that the lower end of Claim 32 joined the upper end of Claim 31.

Defendant in error calls the court's particular attention to this testimony because in spite of this testimony, it is claimed by plaintiff in error that between the upper end of Claim 31 and the lower end of the Kshunti Fraction, there was a fractional portion of defendant in error's Claim 32 upon which defendant in error might have performed the annual labor for 1912, even though the representative of defendant in error had been by plaintiff in error thrown off of the portion of Claim 32 covered by the Kshunti Fraction. To

make this claim good, it is shown by plaintiff in error (Tr., 108) that *after the commencement of this litigation* at the suggestion of plaintiff in error one Mike Nevins located the Bull Head Fraction out of the lower portion of defendant in error's Claim 32.

SPECIFICATION OF ERRORS.

Plaintiff in error in his brief discusses only the third and fourth errors specified and defendant in error will therefore confine his argument within the same limits.

The third error specified is the admission in evidence by the lower court of plaintiff's "Exhibit C," being a letter written by Gus Johnson to N. O. Windquist, predecessor in interest of defendant in error in the mining claim in controversy, the letter describing the ejectment of Johnson from the claim by plaintiff in error, Johnson at the time being on the claim attempting to perform the annual labor for Windquist.

The fourth error specified is the refusal of the lower court to permit the filing of an amended and supplemental answer after the testimony was in and before the case was submitted to the jury, the amendment offered alleging the forfeiture to the United States of defendant in error's mining claim for failure to do assessment work on the claim in 1911 and also in 1912. No point is made in plaintiff in error's brief as to the work for 1911. Discussion herein is therefore confined to the annual labor for 1912.

ARGUMENT.

I.

AS TO THE ADMISSION OF THE LETTER PLAINTIFF'S EXHIBIT "C."

The letter was properly admitted on the question of the failure to do the annual labor for 1912.

This issue was not raised by the pleadings but by the plaintiff in error on the taking of testimony.

It appeared on the trial below that the plaintiff there had not performed the annual labor for 1912 on his claim. The suit was begun in April, 1912. The plaintiff met this issue by showing that he was forcibly prevented by defendant from doing the work.

The testimony of both plaintiff and defendant was that plaintiff's agent was forcibly prevented from doing the annual labor at the place he had selected to do it.

It was *to describe this forcible prevention* and the occurrences in connection with it that *the letter was written*, by the man attempting to do the work, to the owner of the claim; *and the letter was written at the time* the forcible prevention occurred.

The evidence in the case was conflicting as to the making of the locations of the claims, but on the question of the forcible prevention of the performance of the labor the evidence was all one way. It was on this issue that the letter was used. Its admission could not have possibly affected the verdict.

Leedy v. Lehfelddt, 162 Fed., 304, cited by plaintiff in error on this point, is easily distinguished from the case at bar.

There the question was the priority of location. A miner living in a cabin some distance from the claim in controversy testified that at 2 o'clock on the morning in question he awoke to find a scrap of paper upon his table upon which was written by some one: "2.00 a. m. Happy New Year from No. 9 Otter Creek." This note was allowed to go in as evidence that plaintiff in the case had been in the neighborhood of the claim on New Year's morning. There was no testimony that the note was written by plaintiff or that he was at the cabin. The evidence was nearly evenly balanced and this court reversed the case because of the error committed in admitting the note in evidence.

Here the writing of the letter was of the *res gestae* of the ejection of plaintiff's agent from the claim to prevent his doing the assessment work thereon, and was written at the time of the ejection by the witness on the stand testifying at the time of its introduction, who was also the agent who was ejected.

The evidence as to the forcible prevention of the doing of the annual labor for 1912 is more fully discussed and set forth under the next heading.

II.

AS TO THE REFUSAL OF THE COURT TO PERMIT THE FILING OF AN AMENDED AND SUPPLEMENTAL ANSWER.

It is true that as to the question of the location of the claims, the evidence is conflicting, but as to the failure to do the annual labor, there is no conflict. All witnesses agree that Johnson, who was doing the work for the defendant in error, was forcibly prevented from doing it. The only contention of plaintiff in error on this point is that though Johnson was thrown off the portion of defendant in error's claim in conflict with the claim of plaintiff in error, it was still the duty of Johnson to find some spot not in conflict and there do the annual labor, and it is further claimed that plaintiff in error could take advantage in this case of a forfeiture resulting from Johnson's failure to do this.

If such a contention has any force it is lost by the absolute failure here to show that the labor could have been done at any place outside of the conflicting lines with any benefit to defendant in error's claim. The law requiring annual labor not only requires the labor to be done, but that it be done for the development and improvement of the claim, so that if the answer had been amended in accordance with the motion of plaintiff in error, the clear duty of the court below would

have been to instruct the jury to find against the plaintiff in error on the issue thus raised.

The manner in which the annual labor was prevented was as follows: Johnson attempted to do the work at the same place on the claim (Tr., 94) on which he had done it the year before, and went there with another man for this purpose, and had actually performed some of the work when the plaintiff in error by strategy, having securely locked Johnson's helper in a house, proceeded to drive Johnson off the claim and thus himself described the affair (Tr., 98):

"Coming from Broste's cabin, they had to pass my cabin within a couple of hundred feet. I had a conversation with them when they came up the second day. I went out and asked Mr. Broste to come over to the house, that I wanted to talk to Johnson privately. He came over to the house and I, after he came in the house, went out and I had the lock on the outside of the door, and I snapped the lock so as to be sure he would not come out. I had ordered them off the day before and they would not go. I thought one man was better to put off than two, that is the reason I locked him in the house, and I went over there and drove Cayuse Johnson off the claim."

Johnson's description was in part as follows (Tr., 51):

"It was in the fall of the year 1912 that I attempted to do the assessment work on No. 32 in November. Ed. Broste was with me. We worked one day close to the line of the Kshunti Fraction, and the next day Ames would not let us work. The

conversation between Ames and I took place on No. 32, in the hole where I was working. He told me to get out of there, that he would see that I did get out, and took hold of me. I wrote Windquist about that affair."

The letter which Johnson wrote appears on page 52 of the transcript, and then his further description of his ejection:

"Mr. Ames tried to hit me twice when he put me off the claim. Broste was down in Ames' cabin. He could not get out because he was locked in."

In *Mills v. Fletcher*, 100 Cal., 142, 148, the court said:

"The defendants should not be heard to object that plaintiffs in error did not do the annual labor required by law during the year 1890, or any subsequent year while they remained in adverse possession and occupied the only tunnel that was open to the lode and through which plaintiffs in error intended to work. Conceding that plaintiffs in error might have been permitted by defendants to do work on the surface of their claims, there is no evidence that such work or any work outside of the tunnel occupied by defendants would have tended to improve or develop either claim, or could have been done to any advantage whatever, and if not, such work would not have answered the purpose of the law requiring annual labor."

Plaintiff in error could not forcibly prevent the doing of the annual labor by defendant in error and

then ask the court to give him the claim as a reward for his wrongdoing.

Erhardt v. Boaro, 113 U. S., 527.

Nor could plaintiff in error insist that defendant in error do the annual labor on the Bull Head fraction claimed by Mike Nevins which, according to the testimony of plaintiff in error himself, occupied all of defendant in error's claim except that covered by the Kshunti Fraction (Tr., 108).

No forfeiture could have occurred on account of the failure to perform the annual labor for 1912.

This because the Alaska legislature has passed a relief act which prevents the forfeiture by owners of mining claims in that territory for failure to perform the assessment work during the year 1912, where rights of other parties had not vested before the passage of the relief act in April, 1915.

The Act of Congress of March 2, 1907, appears at page 153, Section 162, Chapter 10, Title 4 of the Compiled Laws of Alaska and provides:

“Upon failure of the locator or owner of such claim to comply with the provisions of this act, as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had been made.”

In *Thatcher v. Brown*, 190 Fed., 708, decided by this court in 1911, it was held that a failure to do the annual labor within the calendar year, worked a forfeiture of the claim to a person relocating the claim, though the original locator had resumed work on the claim before the relocation was made.

An act of the Alaska legislature approved April 29, 1915, and appearing at page 144 of the Session Laws of Alaska for 1915, provides that no forfeiture under said Section 162 shall result from the failure to do the annual labor within the calendar year unless intervening rights have vested and accrued, and the operation of said section 162 is held in abeyance until December 31, 1915. The language of the act is as follows:

“Section 1. That that part or portion of said Section 162 reading as follows: ‘And upon failure of the locator or owner of such claim to comply with the provisions of this Act as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had been made,’ be and the same hereby is, amended to read as follows: ‘And upon failure of the locator or owner of such claim to comply with the provisions of this Act, as to performance of work and improvements, the claim or mine upon which such failure occurs shall be open to relocation in the same manner as if no location of the same had ever been made; Provided no forfeiture shall be declared or enforced against any placer or lode mining claim in the Territory of Alaska on account of failure heretofore to perform the annual labor or improvements required by law within any one calendar year, or on account

of the failure to file any affidavit or certificate of labor required by law; Provided, that the person, firm or corporation previously owning said mining claim shall have been in the possession of the same on or before the first day of April, in the year 1915, either during or subsequent to any such calendar year, unless intervening rights have vested and accrued to any such mining claim.

"Provided, That this Act shall not be construed to relieve the owner of any mining claim from any forfeiture declared by law, which may accrue after the 31st day of December, 1915.

"Section 2. All acts and parts of acts in conflict herewith are expressly repealed.

"Section 3. This bill shall take effect from and after its passage.

"Approved, April 29, 1915."

Thus it would appear that if it was error to refuse the request to file the amended and supplemental complaint, no good can come from reversing the case on this point, for under the law as it now stands no forfeiture occurred on account of the failure to perform the annual labor in 1912, on the claim in question, and the case of *Thatcher v. Brown, supra*, does not apply under the law as it now is.

Respectfully submitted,

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Attorneys for Defendant in Error.

2682

NO. 2622

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Reply Brief of Plaintiff in Error

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FOR THE NINTH CIRCUIT

H. C. AMES,	<i>Plaintiff in Error,</i>	}
	<i>vs.</i>	
JERRY SULLIVAN,	<i>Defendant in Error.</i>	

ERROR TO THE DISTRICT COURT FOR THE
DISTRICT OF ALASKA, SECOND
DIVISION

Reply Brief of Plaintiff in Error

In accordance with the permission granted at the oral argument to file a Brief upon the Act of the Territorial Legislature of Alaska relied upon by defendant in error, the plaintiff in error contends:

First:—The Act relied upon was approved April 29th, 1915, and as this cause was tried in the year 1914 (Tr. p. 22), it can have no application whatever;

Second:—The Territorial Legislature has no power to repeal or amend the Act of Congress passed March 2nd, 1907, appearing at page 153 of the Compiled Laws of Alaska (34 Stat. L. 1243) as was attempted by the Act of April 29th, 1915, appearing at page 144 of Alaska Session Laws of 1915. This latter Act is set forth at page 10 of the Brief of defendant in error.

The Act creating the Legislature of the Territory of Alaska granted it no special or general authority to legislate with reference to mining locations.

Compiled Laws of Alaska, pp. 268-273;
37 Stat. L., 512.

Such being the case, the only authority vested in the Legislature of Alaska, with reference to mining locations, is to pass laws *supplemental to and not in conflict with* the laws of the United States.

The subject is so thoroughly treated and explained in Lindley on Mines, 3rd Ed., Vol. 1, Sections 249 and 250, pp. 542, *et seq.*, that further citation of authorities is deemed unnecessary.

Respectfully submitted,

THOMAS R. LYONS

IRA D. ORTON

GEORGE B. GRIGSBY

Attorneys for Plaintiff in Error.

2682

No. 3622.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

H. C. AMES,

Plaintiff in Error,

vs.

JERRY SULLIVAN,

Defendant in Error.

Error to the District Court for the District of Alaska,
Second Division.

**SUPPLEMENTAL BRIEF OF
DEFENDANT IN ERROR.**

T. M. REED,

Nome, Alaska,

O. D. COCHRAN,

Nome, Alaska,

THOS. R. WHITE,

1062 Mills Building, San Francisco, Cal.,

Attorneys for Defendant in Error.

Filed this.....day of July, 1916.

....., Clerk.

By.....Deputy Clerk.

The James H. Barry Co.,
San Francisco

Filed

JUL 2 - 1916

F. D. Monckton

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

H. C. AMES,
vs.
JERRY SULLIVAN,
Plaintiff in Error,
Defendant in Error.

Error to the District Court for the District of Alaska,
Second Division.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

In answer to the Reply Brief of Plaintiff in Error on the question of the validity of the Act of the Legislature of Alaska, Defendant in Error presents the following:

The law, to amend which the Act of the Alaska Legislature referred to in Plaintiff in Error's Reply Brief was passed, was not a general law, but a law applicable only and peculiar to the Territory of

Alaska. Such a law, under the enabling act, the Alaska Legislature had the right to amend or repeal.

By the enabling act, which created the Legislature of the Territory (37 Stat. at L. 512), the Legislature was given the power to pass laws "not inconsistent
"with the Constitution and Laws of the United States,
"but no law shall be passed interfering with the pri-
"mary disposal of the soil."

If the Act in question does not "interfere with the primary disposal of the soil" it is a valid Act of the Legislature.

This same provision was drafted into the enabling acts of the Territories of Arizona and Oklahoma. The Supreme Court of Arizona, in construing the phrase, "but no law shall be passed interfering with the primary disposal of the soil," says:

"The primary disposal, it is needless to say, is the disposal of it by the government when it parts with its title. The Legislature has the power to determine and fix by what tenures lands in the territory shall be held and under what forms titles shall pass and who shall be heirs at the death of the proprietor, and to pass other like laws. The purpose of the organic act was to transfer from Congress to the Territorial Legislature the power that Congress had to pass laws for the people of the territory, upon all rightful subjects of legislation. The Territorial Legislature is substituted for Congress and clothed with the power of Congress. . . . That Congress had the power to pass an Act providing for the exercise of the power of eminent domain in the Territory, none

will question. That it has delegated this power to the Territorial Legislature we think is quite clear."

Oury v. Goodwin, 26 Pac., 376 (Ariz.).

See also:

Topeka Commercial Security Co. v. McPherson, 54 Pac., 489 (Okl.).

Respectfully submitted.

T. M. REED,
O. D. COCHRAN,
THOS. R. WHITE,
Attorneys for Defendant in Error.

United States
Circuit Court of Appeals

For the Ninth Circuit.

J. HOMER FRITCH, INCORPORATED, a Corporation, E. T. KRUSE, MARY BELL PARKER BURNS, CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Northern District of California,
Second Division.

Filed

DEC 2 - 1915

F. D. Monckton,

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit.

J. HOMER FRITCH, INCORPORATED, a Corporation, E. T. KRUSE, MARY BELL PARKER BURNS, CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,

Plaintiffs in Error,

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THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Northern District of California,
Second Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

J. HOMER FRITCH, INCORPORATED, a Cor-
poration, E. T. KRUSE, MARY BELL PAR-
KER BURNS, CECELIA SUDDEN, JAMES
HOGG, JAMES P. TAYLOR and KATE E.
SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondents.

**Petition for Moneys Due from United States Under
Contract of Hire.**

Now come the above-named J. Homer Fritch,
Incorporated, E. T. Kruse, Mary Bell Parker Burns,
Cecilia Sudden, James Hogg, James P. Taylor and
Kate E. Spiers, and respectfully petition the above-
entitled court in a matter arising upon a contract
with the Government of the United States, and al-
lege as follows:

I.

That J. Homer Fritch, Incorporated, one of the
above-named plaintiffs, is, and at all times herein
mentioned was, a corporation duly organized and ex-
isting under and by virtue of the laws of the State of
California; that the principal place of business of said
corporation is, and at all times herein mentioned was,
the City and County of San Francisco, [1*] State
of California; that said plaintiffs are residents of the

*Page-number appearing at foot of page of original certified Record.

City and County of San Francisco, State of California, and at all times hereinafter mentioned were the owners of the steamship "Homer."

II.

That, at all times herein mentioned, W. I. Lembkey was the duly appointed, qualified and acting agent of the Department of Commerce and Labor of the United States of the Seal Fisheries of Alaska; that on or about the 24th day of April, 1911, a charter-party was made and entered into by and between plaintiffs and the said Department of Commerce and Labor of the Government of the United States, in its material portions in words and figures as follows, to wit:

"THIS CHARTER PARTY, made and concluded upon in the City of San Francisco, the 24th day of April, 1911, between J. Homer Fritch, Incorporated, owners of the good twin-screw steamship "Homer" of San Francisco of 501 tons gross register, and 331 tons net register, having engines of 350 nominal horse-power provided with proper certificate for hull and machinery, and classes — at — of — tons cubic capacity and 700 tons dead weight or thereabouts, inclusive of bunkers, which are of the capacity of about 65 tons of coal, and stores now at the port of San Francisco and Secretary of Commerce & Labor U. S. Charters of the City of

Witnesseth, That the said owners agree to lot, and the said Charterers agree to hire the said steamship from the time of delivery, for a period of about [2] 3½ months steamer to be placed at the disposal of

the Charterers, at San Francisco in such dock or at such wharf or place (where she may always safely lie afloat, at all times of tide), as the Charterers may direct, and being, on her delivery ready to receive cargo, and tight, staunch, strong and in every way fitted for the service, including necessary dunnage, having water ballast, steam winches and donkey-boiler with capacity to run all the steam winches at one and the same time (and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage), to be employed in carrying lawful merchandise, including petroleum or its products in cases, and passengers so far as accommodations will allow (but any expense necessary to fit the steamer to comply with United States or other Passenger Inspection laws to be borne by Charterers) between ports within the following limits: Pacific Coast ports and Unalaska, Dutch Harbor, the Pribilof Islands, Bering Sea, as the Charterers or their Agents shall direct, on the following conditions:

* * *

4. That the Charterers shall pay for the use and hire of the said vessel at the rate of One Hundred and Forty-two 50/100 (\$142.50) Dollars per day U. S. Gold Coin, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a day; hire to continue until her delivery in like good order and condition to the Owners (unless lost) at the port of San Francisco, Cal. * * * [3]

6. Payment of said hire to be made in U. S. Gold Coin monthly at the end of each month. * * *

21. That the Charterers have the option, at any time during this Charter, of purchasing the said vessel for the sum of Forty-five Thousand (\$45,000.-00) Dollars against which any amount paid for the hire of the said vessel less cost of operation shall be set off and deducted, but that the purchasers shall pay interest at the rate of 6% per annum (and insurance) on the amount of purchase money from the date of this Charter to the completion of the sale.” * * *

J. HOMER FRITCH (INCORPORATED),
[Corporate Seal] J. HOMER FRITCH,
Prest.

Subject to approval of Dept. of Com. & Labor.

W. I. LEMBKEY,
Agent Seal Fisheries.”

That in making and entering into and executing said charter-party said plaintiff, J. Homer Fritch, Incorporated, acted for itself and for and in behalf of, and as the duly authorized agent of the plaintiffs herein, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers. That said charter-party was duly approved by the Department of Commerce and Labor of the United States, and by the secretary thereof. [4]

III.

That thereafter, and to wit on the 15th day of May, 1911, said steamship “Homer” was placed by plaintiffs at the disposal of said Department, and said secretary, in all respects as to time, condition

of said vessel and equipment thereof, and otherwise in compliance with the terms of said charter-party; that thereupon and on the same day said Department and said secretary accepted said steamship "Homer," together with its equipment, and full complement of officers, seamen, engineers and firemen, as provided in said charter-party; that pursuant to said charter-party said steamship "Homer" was employed and retained by said Department and said secretary from and including the said 15th day of May, 1911, to and including the 12th day of September, 1911, at noon of said last-mentioned day.

IV.

That the hire of said steamship "Homer" becoming due under the terms of said charter-party on and subsequent to the 1st day of September, 1911, has not been paid to plaintiffs by said department or said secretary, or otherwise, or at all, nor has any portion thereof been so paid; that plaintiffs have frequently demanded payment of the same from said department and said secretary, but that said demands have been refused; that there is now due, owing and unpaid to plaintiffs from the United States the sum of one thousand, seven hundred and eighty-one and 25/100 (1781.25) dollars, as hire of said steamship "Homer" as aforesaid. [5]

And for a further cause of claim against the said United States, plaintiffs allege, in addition to all of the facts contained in paragraphs I, II and III of plaintiffs' first cause of claim hereinabove set forth, which are hereby repeated and made a portion of this cause of claim, the following:

IV.

That at all times during the month of September, 1911, and particularly upon the 12th day of September, 1911, Charles Earl was the duly appointed, qualified and acting secretary of the Department of Commerce and Labor of the United States; that on or about said 12th day of September, 1911, said Charles Earl, as such secretary, caused to be transmitted from the City of Washington, District of Columbia, to plaintiffs, at the City and County of San Francisco, and plaintiffs received at said last-mentioned place from said Charles Earl, as such secretary, a telegram in the following words and figures, to wit:

“Washington, D. C., Sept. 12-1911.

J. Homer Fritch, Inc.

San Francisco, Cal.

Would like to have option for purchase of Homer extended thirty days on terms mentioned in paragraph twenty-one of charter otherwise charter to terminate as provided therein answer.

CHARLES EARL,
Acting Secretary.”

That the signature to said last-mentioned telegram was the signature of Charles Earl, as acting secretary of the Department of Commerce and Labor of the United [6] States.

That said last-mentioned telegram was, by said Charles Earl, secretary as aforesaid, addressed to, and caused to be transmitted to, said J. Homer Fritch, Incorporated, for itself and as the agent of the other plaintiffs herein, and the same was re-

ceived by said J. Homer Fritch, Incorporated, for itself and as the duly appointed agent of the other plaintiffs herein.

That on the 14th day of September, 1911, plaintiffs caused to be transmitted to said Charles Earl, as secretary of the Department of Commerce and Labor of the United States, at the City of Washington, District of Columbia, and said Charles Earl, secretary as aforesaid, at said date and place received from plaintiffs, a telegram in the following words and figures, to wit:

“San Francisco, Sept. 14, 1911.

Acting Secretary,

Dep't. of Commerce & Labor,

Washington, D. C.

As requested in your telegram of twelfth instant charter Steamer Homer hereby extended for further period of thirty days from September thirteenth nineteen eleven with option of purchase.

J. HOMER FRITCH, Inc.”

That said telegram last referred to was sent by plaintiffs, as aforesaid, as a reply to said telegram dated September 12, 1911, hereinabove set forth.

That, in signing and causing to be transmitted as aforesaid said telegram dated September 14, 1911, said J. Homer Fritch, Incorporated, acted for itself and for and [7] in behalf of, and as the duly appointed agent of plaintiffs herein, E. T. Kruse, Mary Bell Parker Burns, Cecilia Sudden, James Hogg, James P. Taylor and Kate E. Spiers.

That, pursuant to the aforesaid extension of said charter, said steamship “Homer” was held by plain-

tiffs at San Francisco, from and including the 12th day of September, 1911, at noon of said day, to and including the 13th day of October, 1911, ready to receive cargo and in all respects in the condition required by the terms of said charter-party, with a full complement of officers, seamen, engineers and firemen for a vessel of her tonnage, for said Department and said secretary. That at all of said times said Department and said secretary knew or had reason to know that said steamship "Homer" was being so held in readiness by plaintiffs, as aforesaid.

VI.

That the hire of said steamship "Homer" becoming due in accordance with the terms of said charter-party as extended as above set forth from and including the 13th day of September, 1911, to and including the 12th day of October, 1911, has not been paid to plaintiffs by said Department or said secretary or otherwise or at all, nor has any portion thereof been so paid; that plaintiffs have frequently demanded the payment of the same from said Department and said secretary and such payment has been refused; that there is now due, owing and unpaid from the United States to plaintiffs, as such hire, the sum of four thousand four hundred and eighty-eight and 75/100 (4,488.75) dollars.

WHEREFORE, plaintiffs ask the judgment of [8] this Honorable Court against the said United States for the sum of six thousand one hundred and twenty-seven and 50/100 (6127.50) dollars, with interest thereon, and their costs of suit, and for such other and further relief as may be meet in the premises.

And plaintiffs will ever pray, etc.

J. HOMER FRITCH (INCORPORATED),

By JAMES B. SMITH,

President.

E. T. KRUSE.

MARY BELL PARKER BURNS.

CECILIA F. SUDDEN.

JAMES HOGG.

JAMES P. TAYLOR.

KATE E. SPIERS.

IRA A. CAMPBELL,

Attorney for Plaintiffs and Petitioners. [9]

State of California,

City and County of San Francisco,—ss.

James B. Smith, being first duly sworn, deposes and says:

That he is an officer, to wit, the president of J. Homer Fritch, incorporated, the corporation named as one of the petitioners and plaintiffs herein; that he makes this verification for and in behalf of said corporation, and as its president; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters, that he believes it to be true.

JAMES B. SMITH.

Subscribed and sworn to before me this 9th day of July, A. D. 1912.

[Seal]

JAMES MASON,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Sep. 12, 1912. Jas. P. Brown,
Clerk. By J. A. Schaertzer, Deputy Clerk. [10]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

J. HOMER FRITCH, INCORPORATED, a Corpora-
tion, **E. T. KRUSE, MARY BELL PARKER
BURNS, CECELIA SUDDEN, JAMES
HOGG, JAMES P. TAYLOR and KATE E.
SPIERS,**

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondents.

**Affidavit of Service upon the United States District
Attorney, and of Mailing to the Attorney
General of the United States.**

City and County of San Francisco,
State of California,
Northern District of California,—ss.

C. T. Elliott, being first duly sworn, deposes and
says:

That he is, and at all times herein mentioned was,
the duly appointed, qualified, and acting United
States Marshal for the Northern District of Cali-
fornia;

That, on the 12th day of September, 1912, at the
City and County of San Francisco, State of Cali-
fornia, in the Northern District of California, affiant
personally served [11] upon John L. McNab,

Esq., the District Attorney of the United States, in and for the Northern District of California, personally, the annexed summons in the above-entitled action, by personally delivering to and leaving with said John L. McNab, personally, a true and correct copy of said summons; that at the same time and place affiant served said John L. McNab, District Attorney of the United States, as aforesaid, with the petition in the above-entitled action, by personally delivering to and leaving with said John L. McNab, personally, a true and correct copy of said petition; that said copy of said summons, and said copy of said petition, hereinabove referred to, were duly certified by the clerk of the said District Court of the United States, in and for the Northern District of California, Second Division thereof, to be true and correct copies of said summons and of said petition;

That, on the said 12th day of September, 1912, at the City and County of San Francisco, State of California, in the Northern District of California, affiant mailed a true and correct copy of said petition to the ~~Attorney-General~~ of the United States, by registered mail; that said copy of said petition last referred to was duly certified to be a true and correct copy of said petition by the Clerk of the District Court of the United States, in and for the Northern District of California, Second Division thereof; that affiant enclosed and sealed said copy in an envelope, addressed as follows, to wit:

Hon. George W. Wickersham,
~~Attorney-General~~ of the United States,

Washington, D. C. [12]

12 *J. Homer Fritch, Incorporated, et al.*

That affiant personally deposited said sealed envelope in the United States Postoffice, at the time and place above specified, postage thereon being fully prepaid.

And further affiant saith not.

C. T. ELLIOTT.

Subscribed and sworn to before me, this 23d day of September, 1912.

[Seal]

W. B. MALING,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Oct. 8, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [13]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Corporation, E. T. KRUSE, MARY BELL PARKER BURNS, CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondents.

Amended Answer.

By leave of Court first had and obtained, the respondent files his amended answer herein and answering the first cause of action herein set forth,

admits that the hire of said steamship "Homer" becoming due under the terms of said charter-party on and subsequent to the first day of September, 1911, has not been paid to plaintiffs by said Department or said secretary, but denies that no portion thereof has been paid and in this regard respondent alleges that the sum of one hundred and seventy-six (\$176.00) dollars has been paid thereon by the said respondent.

Denies that plaintiffs have frequently demanded payment of the same from said Department or said secretary of the treasury or at all and denies that said demands have been refused and in this regard the [14] respondent alleges that on the 25th day of October, 1911, respondent wrote the plaintiffs herein as follows:

"You are therefore requested to submit to the Department bills for the chartering of the 'Homer' from September 1 to September 12, noon, 11½ days, at \$142.50 per day, and to give credit thereon to the Department for 32 tons of coal remaining in the Homer's bunkers at the time of the relinquishment at \$5.50 per ton."

Denies that there is now due, owing or unpaid to the plaintiffs from the United States, the sum of \$1,781.25 as hire of said steamship "Homer" on account of the matters set forth in the first count of said petition as aforesaid in any other or greater sum than \$1,462.75.

And for an answer to the second cause of action set forth in said petition, respondent denies and avers as follows, to wit:

Respondent has no information or belief upon the subject sufficient to enable him to answer the matters set forth in the last paragraph of section 4 of the said second count and basing his denial upon that ground, denies that pursuant to an extension of the charter referred to therein or at all, was the steamship "Homer" held by plaintiffs at San Francisco from and including the 12th day of September, 1911, at noon of said day to and including the 13th day of October, 1911, or at all, ready to receive cargo or in all or any respects in the condition required by the terms of said charter-party with a full complement of officers, or seamen or engineers or firemen for a vessel of her tonnage for the said Department or the said secretary.

Denies that at all of said times or at all did the said Department or said secretary know or have reason to know that said steamship "Homer" was being held in readiness by plaintiffs as aforesaid. [15]

Denies that any hire of the said steamship "Homer" became due in accordance with the terms of the said charter-party as extended and denies that the said charter-party was extended from or after the 13th day of September, 1911, or at all.

Admits that plaintiffs have frequently demanded the payment of the sum of \$4,488.75 on account of said hire for said alleged extension but denies that the said hire or any hire on account of any extension of said charter-party is now due, owing or unpaid from the United States to the plaintiffs.

JOHN W. PRESTON,
United States Attorney,
Attorney for Respondent.

State of California,

City and County of San Francisco,—ss.

M. A. Thomas, being first duly sworn, deposes and says that he is an Assistant United States Attorney for the Northern District of California; that no officer of the United States or of the Seal Fisheries of Alaska who is familiar with the facts in the above-entitled cause is within the State of California; that for the foregoing reasons affiant verified the foregoing answer and states that he has read the same and knows the contents thereof and that the same is true, except as to matters therein stated on information or belief and as to those matters he believes it to be true.

M. A. THOMAS.

Subscribed and sworn to before me this 11th day of May, 1915.

WALTER B. MALING,

Clerk U. S. District Court, Nor. Dist. Calif. [16]

[Endorsed]: Filed May 11th, 1915. Walter B. Maling, Clerk. [17]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Cor-
poration, E. T. KRUSE, MARY BELL
PARKER BURNS, CECELIA SUDDEN,
JAMES HOGG, JAMES P. TAYLOR and
KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondents.

Stipulation and Agreed Statement of Facts.

It is hereby stipulated and agreed between the
plaintiffs above named and the United States, re-
spondent herein, as follows:

1. That all of the facts alleged in count one of the
complaint herein are true with the following excep-
tions:

(a) The amount due for the hire of the S. S.
“Homer” from September 1, 1911, to noon of Sep-
tember 12, 1911, was \$1,638.75 instead of \$1,781, 25,
as alleged in paragraph IV of said count one;

(b) Plaintiffs’ consent that \$176 be offset against
this amount for coal left in the bunkers of said S. S.
“Homer,” when possession was relinquished by the
United States. [18]

2. A jury having been duly waived by the respec-
tive parties, and the cause having been submitted

to the Court, sitting without a jury, it is hereby stipulated and agreed by and between the respective parties hereto that the following facts may be deemed and taken as proven upon the trial of said action and upon any trial thereof, and may be deemed to be in evidence for all purposes upon such trial:

I.

That J. Homer Fritch, Incorporated, one of the above-named plaintiffs, is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that the principal place of business of said corporation is, and at all times herein mentioned was, the City and County of San Francisco, State of California; that said plaintiffs are residents of the City and County of San Francisco, State of California, and at all times hereinafter mentioned were the owners of the S. S. "Homer."

II.

That at all times herein mentioned W. I. Lembkey was the duly appointed, qualified and acting agent of the Department of Commerce and Labor of the United States of the Seal Fisheries of Alaska; that on or about the 24th day of April, 1911, a charter-party was made and entered into by and between plaintiffs [19] and the said Department of Commerce and Labor of the Government of the United States. That said charter-party was in the words and figures following, to wit:

"TIME CHARTER.

THIS CHARTER-PARTY, made and concluded upon in the City of San Francisco, the 24th

day of April, 1911, between J. Homer Fritch, Incorporated, owners of the good twin-screw steamship "Homer" of San Francisco of 501 tons gross register, and 331 tons net register, having engines of 350 nominal horse-power provided with proper certificate for hull and machinery, and classes — at — of — tons cubic capacity and 700 tons dead weight or thereabouts, inclusive of bunkers, which are of the capacity of about 65 tons of coal, and stores now at the port of San Francisco and Secretary of Commerce & Labor U. S. Charters of the City of

Witnesseth, That the said owners agree to let, and the said Charterers agree to hire the said steamship from the time of delivery, for a period of about 3½ months steamer to be placed at the disposal of the Charterers, at San Francisco in such dock or at such wharf or place (where she may always safely lie afloat, at all times of tide), as the Charterers may direct, and being, on her delivery ready to receive cargo, and tight, staunch, strong and in every way fitted for the service, including necessary dunnage, having water ballast, steam winches and donkey-boiler with capacity to run all the steam winches at one and the same time (and with full complement of officers, seamen, engineers [20] and firemen for a vessel of her tonnage), to be employed in carrying lawful merchandise, including petroleum or its products in cases, and passengers so far as accommodations will allow (but any expense necessary to fit the steamer to comply with the United States or other Passenger Inspection laws to be borne by Charter-

ers) between ports within the following limits: Pacific Coast ports and Unalaska, Dutch Harbor, the Pribilof Islands, Bering Sea, as the Charterers or their Agents shall direct, on the following conditions:

1. That the owners shall provide and pay for all provisions, wages and consular shipping and discharging fees of the Captain, Officers, Engineers, Firemen and crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine-room and other necessary stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the service.

2. That the Charterers shall provide and pay for all the Coals, Port Charges, Pilotages, Agencies, Commissions, Consular Charges (except those pertaining to the captain, officers or crews), and all other charges whatsoever, except those before stated.

3. That the Charterers shall accept and pay for all Coal in the Steamer's Bunkers, and the Owners shall on expiration of this Charter-party, pay for Coal left in the bunkers, at the current market prices at the respective ports where she is delivered to them.

4. That the Charterers shall pay for the use and hire of the said vessel at the rate of One hundred and Forty-two 50/100 (\$142.50) Dollars per day U. S. Gold Coin, commencing [21] on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a day; hire to continue until her delivery in like good order and condition to the Owners (unless lost) at The port of San Francisco, Cal.

5. That should the steamer be on her voyage towards the port of return delivery at the time a payment of hire becomes due, said payment shall be made for such a length of time as the owners or their agents, and Charterers, or their agents, may agree upon as the estimated time necessary to complete the voyage, and when the steamer is delivered to owner's agents any difference shall be refunded by steamer or paid by Charterers, as the case may require.

6. Payment of said hire to be made in U. S. Gold Coin monthly at the end of each month, and in default of such payment the Owners shall have the faculty of withdrawing the said steamer from the service of the Charterers without prejudice to any claim they (the Owners) may otherwise have on the Charterers, in pursuance of this Charter.

7. That the cargo or cargoes to be laden and / or discharged in any dock or at any wharf or place that the Charterers or their Agents may direct, provided the Steamer can always safely lie afloat at any time of tide.

8. That the whole reach of the Vessel's Holds, Decks, and usual place of loading, and accommodation of the ship (not more than she can reasonably stow and carry), shall be at the Charterer's disposal, reserving only proper and sufficient space for Ship's officers, crew, tackle, apparel, furniture, provisions, stores and fuel.

9. That the Captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance [22] with Ship's crew and

boats. That the captain (although appointed by the Owners), shall be under the orders and direction of the Charterers as regards employment, agency, or other arrangements; and the Charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the Captain signing Bills of Lading or otherwise complying with the same.

10. That if the Charterers shall have reason to be dissatisfied with the conduct of the Captain, Officers or Engineers, the Owner shall, on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments.

11. That the Charterers shall have permission to appoint a super-cargo who shall accompany the steamer and see that voyages are prosecuted with the utmost dispatch. He is to be furnished free of charge, with first-class accommodations, and same fare as provided for captain's table.

12. That the Master shall be furnished from time to time with all requisite instructions and sailing directions, and shall keep a full and correct Log of the voyage or voyages, which are to be patent to the Charterers or their Agents.

13. That the Master shall use all diligence in caring for the ventilation of the cargo.

14. That the Charterers shall have the option of continuing this charter for a further period of thirty days (30) on giving notice thereof to the owners or their agents twenty (20) days previous to the expiration of the first-named term, or any declared option.

15. That if required by Charterers, time not to commence [23] before May 15, 1911, and should Steamer not be ready for delivery on or before May 18, 1911, Charterers or their agents to have the option of cancelling this charter, at any time not later than the day of Steamer's readiness.

16. That in the event of loss of time from deficiency of men or stores, break-down of machinery, stranding, or damage preventing the working of the Vessel for more than twenty-four consecutive working hours, the payment of hire shall cease until she be again in efficient state to resume her service, but should the Vessel be driven into port or anchorage by stress of weather or from any accident to the cargo, such detention or loss of time shall be at the Charterer's risk and expense.

17. That should the Vessel be lost, freight paid in advance and not earned (reckoning from the date of her loss), shall be returned to the Charterers. The act of God, enemies, fire, restraint of Princes, Rulers and the People, and all dangers and accidents of the Seas, Rivers, Machinery, Boilers, Steam Navigation, and Errors of Navigation, throughout this Charter-Party, always mutually excepted.

18. That should any dispute arise between the owners and the Charterers, the matter in dispute shall be referred to three persons in San Francisco, California, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision, or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court.

19. That the owners shall have a lien upon all cargoes and all sub-freights, for any amounts due under this Charter, and the Charterers to have a lien on the Ship for [24] all moneys paid in advance and not earned.

20. That all derelicts and salvages shall be for Owners' and Charterers' equal benefit. General Average, if any, to be according to York-Antwerp rules, 1890.

21. That the Charterers have the option, at any time during this Charter, of purchasing the said vessel for the sum of Forty-five Thousand (\$45,000.00) Dollars against which any amount paid for the hire of the said Vessel less cost of operation shall be set off and deducted, but that the Purchasers shall pay interest at the rate of 6% per annum (and insurance) on the amount of purchase money from the date of this Charter to the completion of sale.

22. That as the steamer may be from time to time employed in tropical waters during the term of this Charter, steamer is to be docked, bottom cleaned and painted whenever Charterers and Master think necessary, at least once in every six months and payment of the hire to be suspended until she is again in proper state for the service.

23. Steamer to work night and day if required by Charterers, and all steam winches to be at Charterers' disposal during loading and discharging, and Steamer to provide men to work same both day and night as required, Charterers agreeing to pay extra expense if any incurred by reason of night work, at the current local rate.

24. It is also mutually agreed, that this Charter is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled "An Act relating to the Navigation of Vessels, etc." [25]

25. Penalty for non-performance of this Contract, estimated amount of Charter.

Charterers are to pay at the rate of One Dollar (\$1.00) per day for subsistence supplied to passengers.

It is further understood that Capt. A. Donaldson shall go as master of the Stmr. "Homer" during the life of this charter.

J. M. LITCHFIELD, Witness
to the signature of

J. HOMER FRITCH (INCORPORATED. (Seal)

J. HOMER FRITCH, Prest.,
Agent.

Dated at, 19...

Subject to Approval of Dept.
of Com. & Labor:

J. M. LITCHFIELD, Witness
the signature of

W. I. LEMBKEY,
Agent Seal Fisheries.

a copy of the original Charter-party.

According to telegram of September 12th received from Mr. Chas. Earl, Acting Secretary, Department of Commerce & Labor, this charter is hereby extended for a period of 30 days from September 13th, 1911.

Subject to approval of Dept. of Commerce & Labor:

W. I. LEMBKEY,
Agent Seal Fisheries."

That in making and entering into and executing

said charter-party said plaintiff, J. Homer Fritch, Incorporated, acted for itself and for and in behalf of, and as the duly authorized agent of, the plaintiffs herein, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers. That said charter-party was duly approved by the Department '[26]' of Commerce and Labor of the United States, and by the secretary thereof.

III.

That thereafter and to wit, on the 15th day of May, 1911, said S. S. "Homer" was placed by plaintiffs at the disposal of said Department, and said secretary, in all respects as to time, condition of said vessel and equipment thereof, and otherwise in compliance with the terms of said charter-party; that thereupon and on the same day said Department and said secretary accepted said S. S. "Homer," together with its equipment, and full complement of officers, seamen, engineers and firemen, as provided in said charter-party; that pursuant to said charter-party said S. S. "Homer" was employed and retained by said Department and said secretary from and including the said 15th day of May, 1911, to and including the 12th day of September, 1911, at noon of said last-mentioned day.

IV.

That at all times during the month of September, 1911, and particularly upon the 12th day of September, 1911, Charles Earl was the duly appointed, qualified and acting secretary of the Department of Commerce and Labor of the United States; that on

or about said 12th day of September, 1911, said Charles Earl, as such secretary, caused to be transmitted from the City of Washington, District of Columbia, to plaintiffs, at the City and County of San Francisco, and plaintiffs received at said last mentioned place from said Charles Earl, as such secretary, a telegram in the following words and figures, to wit: [27]

“Washington, D. C. Sept. 12-1911.

J. Homer Fritch, Inc.

San Francisco, Cal.

Would like to have option for purchase of Homer extended thirty days on terms mentioned in paragraph twenty one of charter otherwise charter to terminate as provided therein answer.

CHARLES EARL,

Acting Secretary.”

That the signature to said last-mentioned telegram was the signature of Charles Earl, as acting secretary of the Department of Commerce and Labor of the United States.

That said last-mentioned telegram was, by said Charles Earl, secretary as aforesaid, addressed to, and caused to be transmitted to, said J. Homer Fritch, Incorporated, for itself and as the agent of the other plaintiffs herein, and the same was received by said J. Homer Fritch, Incorporated, for itself and as the duly appointed agent of the other plaintiffs herein.

That thereafter, and to wit on or about the 13th day of September, 1911, plaintiffs submitted said last-mentioned telegram to the said W. I. Lembkey,

the said agent of said secretary and said Department for the management of the Alaska Seal Fisheries, and thereupon the said Lembkey endorsed the following upon the original of said charter-party agreement:

“According to telegram of September 12th received from Mr. Chas. Earl, Acting Secretary, Department of Commerce & Labor, this Charter is hereby extended for a period of 30 days from September 13th, 1911.

Subject to approval of Dept. of Commerce & Labor,

W. I. LEMBKEY,
Agent Seal Fisheries.” [28]

That thereupon, and on the 14th day of September, 1911, plaintiffs caused to be transmitted to said Charles Earl, as secretary of the Department of Commerce and Labor of the United States, at the City of Washington, District of Columbia, and said Charles Earl, secretary as aforesaid, at said date and place received from plaintiffs, a telegram in the following words and figures, to wit:

“San Francisco, Sept. 14, 1911.

Acting Secretary,

Dept. of Commerce & Labor,
Washington, D. C.

As requested in your telegram of twelfth instant charter steamer “Homer” hereby extended for further period of thirty days from September thirteenth nineteen eleven with option of purchase.

J. HOMER FRITCH, INC.”

That in signing and causing to be transmitted, as

aforesaid, said telegram dated September 14th, 1911, said J. Homer Fritch, Incorporated, acted for itself and for and in behalf of, and as the duly appointed agent of plaintiffs herein, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers.

V.

That said S. S. "Homer" was employed by said secretary and said Department during the term of said charter-party, in connection with the work of said Department in carrying on the administration of the Alaska Seal Fisheries, and was sent by said Department to the Coast of Alaska; that said S. S. "Homer" arrived at the port of San Francisco from the coast of Alaska, prior to the twelfth day of September, 1911, being still in the possession of the said United States, pursuant to said charter-party [29] agreement, and having been continuously in the possession of said United States, since May 15th, 1911, as aforesaid, and forthwith proceeded to discharge her cargo;

That on the tenth day of October, 1911, plaintiffs caused to be transmitted to said secretary and said Department a telegram in the following words and figures, to wit:

"San Francisco, Oct. 10, 1911.

George M. Bowers,

Commissioner of Fisheries,

Dep't. of Commerce & Labor,

Washington, D. C. [30]

Your extension of charter and option of Steamer 'Homer' expires October 13th. Should this ex-

pire without further action on the part of the department Ship will go to holder of second option upon which one thousand dollars has been paid. Should you indicate that you wish to exercise your option terms of payment can be satisfactorily arranged without doubt. Kindly wire your wishes in the premises.

J. HOMER FRITCH."

That in sending said last-mentioned telegram said J. Homer Fritch acted in behalf of all of the plaintiffs herein; that said last-mentioned telegram was received by said secretary and said Department prior to the twelfth day of October, 1911; that thereafter and on said twelfth day of October, 1911, said secretary and said Department, in the City of Washington, District of Columbia, caused to be transmitted to plaintiffs, in the City and County of San Francisco, State of California, a telegram in the following words and figures, to wit:

Washington, D. C. Oct. 12-11.

J. Homer Fritch, Inc.

Fife Bldg., Sanfran.

Replying yours Oct ten Bureau of Fisheries is not in position to purchase Homer.

I. H. DUNLAP,
Actg. Commr."

That said last-mentioned telegram was received by plaintiffs at said City and County of San Francisco on the thirteenth day of October, 1911.

That on or about the 25th day of October, 1911, said secretary and said Department mailed a letter in the City of Washington, District of Columbia,

to plaintiffs, notifying plaintiffs [31] that said Department would not require the use of said S. S. "Homer," and would not exercise its option to purchase said "Homer"; that said letter was received by plaintiffs on or about the —— day of November, 1911, and was in the following words and figures:

"Washington, October, 25, 1911.

Mr. J. Homer Fritch,
110 East Street,
San Francisco, Cal.

Sir:

Replying to your letter of the 14th instant, inclosing duplicate bills for charter of the steamship 'Homer' from September 1 to October 13, 1911, inclusive, you are informed that the vessel was discharged and relinquished to her owners on September 12 noon and that the Department has not extended or renewed the charter nor approved the action of any officer of the Department attempting to bind it for charter money beyond that time.

Respectfully,
(Sgd.) BEN J. CABLE,
Acting Secretary."

That on said last-mentioned date the said Ben J. Cable was the duly appointed and qualified acting secretary for said Department.

VI.

That nothing has been paid by said United States or by said Department or by any person or persons whomsoever to plaintiffs, or to any of them, or at all, on account of hire earned by said steamship "Homer" for the period referred to herein, that is

to say, from the 12th day of September, 1911, to and including the 13th day of October, 1911; that plaintiffs have frequently demanded the same from said United States and said Department since said 13th day of October, 1911, but that said demand has been refused. [32]

It is stipulated that upon the trial of said cause of action the said facts may be deemed as true and as in evidence and as proven in all respects and with the same effect as if evidence had been offered to prove the same; it is further stipulated that as to the matters covered by this stipulation, said statement of facts may be deemed and taken as special findings of fact, and may be deemed and treated as such for all purposes; it is further stipulated that the parties hereto may offer such evidence, and evidence of such additional facts, as they or either or any of them may desire.

Dated, San Francisco, California, March 16th, 1915.

IRA A. CAMPBELL,
Attorney for Petitioners and Plaintiffs.

JOHN W. PRESTON,
Attorney for Respondent.

[Endorsed]: Filed May 4, 1915. Walter B. Malling, Clerk. [33]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Corpora-
tion, E. T. KRUSE, MARY BELL PARKER
BURNS, CECELIA SUDDEN, JAMES
HOGG, JAMES P. TAYLOR and KATE E.
SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondents.

Waiver of Trial by Jury.

A trial by jury, in the above-entitled action, is
hereby expressly waived.

Dated August 21, 1913.

IRA A. CAMPBELL,
Attorney for Petitioners and Plaintiffs.

B. L. McKINLEY,
United States Attorney.

By T. H. SELVAGE,
Asst.

[Endorsed]: Filed Aug. 21, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [34]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Corpora-
tion, E. T. KRUSE, MARY BELL PARKER
BURNS, CECELIA SUDDEN, JAMES
HOGG, JAMES P. TAYLOR and KATE E.
SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondents.

Findings of Fact.

The Court finds in the above-entitled case that all the facts admitted by the pleadings and the agreed statement of facts are true and in addition thereto finds:

1. That the steamship "Homer" was fully discharged of her cargo and turned over to the owners by the charterers on or prior to the 12th day of September, 1911, at the port of San Francisco, California.

2. That W. I. Lembkey did not have authority to extend the charter-party beyond the 12th day of September, 1911, and his attempted extension thereof was not ratified or approved by the Department of Commerce and Labor or by any Department or agent of the defendant.

3. That there was no contract or agreement be-

tween the plaintiffs and the defendant extending the charter-party beyond September 12, 1911. [35]

Conclusions of Law.

From the foregoing the Court concludes as follows:

First. That the plaintiffs are entitled to judgment upon the first count of the complaint for the sum of one thousand four hundred and sixty-two and 75/100 (1,462.75) dollars with interest thereon at the rate of seven per cent per annum from September 12, 1911.

Second. That respondent is entitled to judgment, that the plaintiffs take nothing on the second count of the complaint.

Let judgment be entered accordingly.

San Francisco, Cal.

Dated November 5th, 1915.

WM. C. VAN FLEET,
Judge of said Court.

[Endorsed]: Filed Nov. 5, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [36]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Corpora-
tion, E. T. KRUSE, MARY BELL PARKER
BURNS, CECELIA SUDDEN, JAMES
HOGG, JAMES P. TAYLOR and KATE E.
SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondent.

Judgment.

This cause came on regularly for trial on Tuesday, the 11th day of May, 1915, being a day in the March, 1915, term of said District Court, before the Court, sitting without a jury, a jury having been duly waived in writing signed by counsel for both parties in the manner prescribed by law, Ira A. Campbell, Esq., appearing at attorney for the plaintiffs and M. A. Thomas, Esq., Assistant United States Attorney, appearing for the defendant; and the trial having been proceeded with; and evidence oral and documentary upon the behalf of the respective parties having been introduced and the agreed statement of facts stipulated to by the respective parties having been also introduced, and the cause having been submitted to the Court for hearing and determination after argument; and the Court having made and filed its findings of fact and conclusions of law, and having ordered that judgment be entered in accord-

ance with the said findings and conclusions;

NOW, THEREFORE, by reason of the law and by reason of the premises aforesaid, and by reason of the findings of fact and conclusions of law aforesaid, [37]

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as follows:

1. That petitioners and plaintiffs herein, J. Homer Fritch, Incorporated, a corporation, E. T. Kruse, Mary Bell Parker Burns, Cecilia Sudden, James Hogg, James P. Taylor and Kate E. Spiers, have and recover of and from the United States, respondent herein, upon the cause of action set forth and contained in the first count of the petition or complaint on file herein, the sum of one thousand four hundred sixty-two and $75/100$ (1,462.75) dollars, together with the sum of four hundred twenty and $90/100$ (420.90) dollars, being interest thereon at the rate of seven (7) per cent per annum, from the 12th day of September, 1911, to the date hereof.

2. That said plaintiffs take nothing by the second count contained in the petition or complaint on file herein.

Judgment entered November 5, 1915.

W. B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

A true copy. Attest:

[Seal]

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed Nov. 5, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [38]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Corpora-
tion, E. T. KRUSE, MARY BELL PARKER
BURNS, CECELIA SUDDEN, JAMES
HOGG, JAMES P. TAYLOR and KATE E.
SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondents.

Bill of Exceptions.

BE IT REMEMBERED that on the 11th day of
May, 1915, the above-entitled cause came on regu-
larly for trial before the Hon. William C. Van Fleet,
Judge of the above-entitled court, a jury having
been duly waived in the manner required by law,
in writing, Ira A. Campbell, Esq., and John F. Cas-
sell, Esq., appearing as attorneys for the plaintiffs
and petitioners, and M. A. Thomas, Esq., Assistant
United States Attorney, appearing for respondents;
and thereupon the following proceedings were had:

[Proceedings Had May 11, 1915.]

The agreed statement of facts on file herein was
thereupon read. Said agreed statement is hereby
referred to and made a part hereof, but is not cop-

ied into this bill of exceptions inasmuch as it is on file herein. [39*—1†]

Mr. THOMAS.—You admit that the original charter terminated on the 12th of September, 1911?

Mr. CASSELL.—We contend that the charter was extended.

The COURT.—You say in your petition that the steamer on her return was formally tendered to the owner?

Mr. CASSELL.—It was tendered to the owner by the captain.

The COURT.—Yes; he is the one in charge.

Mr. CASSELL.—But these telegrams had arrived prior to that time.

The COURT.—That is a different thing. You admit that she was formally tendered by the Government upon her return to the owners?

Mr. CASSELL.—Yes, sir. I will read a portion of the agreed statement. In our complaint we have only set out the provisions that are material here. The stipulation admits that the first count is correct. The agreed statement entitles the plaintiff to judgment in any event upon the first count in the sum of \$1,638.75, with interest from September 12, 1911. The remainder of the agreed statement of facts relates entirely to the second count. (Reads):

I will ask Mr. Thomas to stipulate that there appeared on the telegram referred to in this agreed statement of facts the time at which the telegram

*Page-number of Original Certified Transcript of Record.

†Original page-number of Bill of Exceptions as same appears in Original Certified Transcript of Record.

was sent from Washington, which was 10:07 A. M.

Mr. THOMAS.—That is all right.

Mr. CASSELL.—And the agreed statement will be deemed amended in that respect?

Mr. THOMAS.—Yes.

The COURT.—It seems to me that that agreed statement should state as to when the vessel was fully discharged of her [40—1-a] cargo and turned over to the owners.

Mr. THOMAS.—That was the point I raised a while ago. We had in our agreed statement of facts that clause, and it was inadvertently struck out. That is why I asked counsel if he would stipulate that the original charter terminated on the 12th day of September, and that the vessel was turned over by the captain at that time. That is the statement as we had it, Mr. Cassell.

Mr. CASSELL.—I never stipulated that the charter was terminated.

The COURT.—The cargo had been discharged and the vessel was turned over to the owners on the 12th of September.

Mr. CASSELL.—Before it was actually turned over this new arrangement had been entered into on this telegram.

The COURT.—I am not discussing that. I am talking about the physical fact. You said it was turned over; I believe it was taken over to Oakland Creek.

Mr. CASSELL.—At about 10:30 this telegram was received from Washington; at 12 o'clock noon the vessel was to be turned over; our people went

to the dock and the vessel was turned over to them, and they put somebody in charge for the Government as they believed.

The COURT.—That is a matter of law whether they put somebody in charge on behalf of the Government, or not; he is simply asking you to stipulate as to what the fact was. The Court will determine what the legal effect was.

Mr. CASSELL.—The cargo had been discharged.

The COURT.—The cargo had been discharged and the vessel had been tendered to the owners.

Mr. CASSELL.—I would hardly say that it had been tendered [41—1-b] to the owners.

The COURT.—But you have said so yourself. I am simply quoting what you stated. You said it was taken by the owner and put in the Oakland Creek for the Government.

Mr. CASSELL.—I simply did not want to convey the idea that the Government tendered it to the owners with the idea that the charter was terminated.

While the captain and the others were paid by the owners, they were really in the employ of the Government. If Mr. Fritch went to the dock at 12 o'clock, if the charter was extended the "Homer" was not placed in his charge at all; it was actually in the hands of men—

The COURT.—We are not talking about that; the vessel's cargo had been discharged, had it?

Mr. CASSELL.—Yes, sir.

The COURT.—And you had been notified that the vessel was ready for the owners?

Mr. CASSELL.—We had been notified that the cargo was discharged.

The COURT.—The other is a matter of legal effect.

Mr. THOMAS.—I think I can clear that up by reading from this paper—

Mr. CASSELL.—I don't care to have it read, Mr. Thomas.

The COURT.—What is it?

Mr. THOMAS.—(Reading:) “That prior to the 12th day of September, 1911, said SS. “Homer” docked alongside the long [42—1-c] wharf, on the Oakland shore in the Bay of San Francisco; that on or prior to said 12th day of September, 1911, the captain of said steamship notified plaintiff that the voyage of said SS. “Homer” was complete, that the cargo was discharged and that she was subject to the order of the plaintiffs.”

You will remember, Mr. Cassell, that I asked you to strike out from there down—from “Plaintiffs” down; I felt that that was the agreed statement of facts in that regard.

The COURT.—Well, was that the fact, in substance, that they had been notified.

Mr. CASSELL.—They had been notified that the voyage was terminated and that the cargo had been discharged.

The COURT.—That is all. I am not asking you to concede what the legal effect of it was. That is a matter for the Court to determine. [43—1-d]

[Testimony of John D. McKee, for Plaintiffs.]

JOHN D. McKEE, a witness called in behalf of plaintiffs, having been duly sworn, testified as follows:

The WITNESS.—I am vice-president of the Mercantile Trust Company of San Francisco, and president of the Mercantile National Bank, and held those offices during the year 1911. At that time the company known as J. Homer Fritch, Inc., was a debtor of the Mercantile Trust Company of San Francisco, and considerable control over the affairs of the Fritch Company was given to me in behalf of the Mercantile Trust Company of San Francisco. I knew at that time Mr. J. Homer Fritch, who was president of J. Homer Fritch, Inc. Mr. Fritch did not consult me about making the charter of the steamer “Homer” with the Government originally, but he did consult me about the extension. I knew that the “Homer” was chartered to the Government and had seen the charter and knew the terms of the charter. Whenever any steps concerning the chartering of the “Homer” were taken by Mr. Fritch I was consulted, and I was consulted as to practically all of the affairs of J. Homer Fritch, Inc. I have seen the telegram referred to in the agreed statement of facts in this case, from Charles Earl, acting secretary of J. Homer Fritch, Inc., dated September 12, 1911.

Mr. CASSELL.—Q. Mr. McKee, will you state when and where you first saw that telegram?

A. I am refreshing my mind now by looking at the date on the telegram; I saw it on the morning of the day that it was sent.

(Testimony of John D. McKee.)

Q. Sent by whom?

A. It was brought to me by Mr. Fritch. [44—2]

The COURT.—Q. You mean you saw it on the day that it was received here?

A. Yes, sir. I saw it on September 12, 1911. 1911. What I meant to say was that I am basing my statement on the date I see in the telegram before me; I have not any other means of recalling the date.

Mr. CASSELL.—Q. Where did you see it?

A. In my office.

Mr. CASSELL.—I offer this telegram in evidence.

Mr. THOMAS.—It is in the agreed statement of facts.

The COURT.—You had best identify it as the telegram of such and such a date and mentioned in the agreed statement.

Mr. CASSELL.—It will be stipulated that this telegram mentioned in the statement received from the Government by J. Homer Fritch Co., Inc., is this telegram.

Q. Who showed you that telegram?

A. Mr. Fritch.

Q. Was anyone else present at the time?

A. Yes, Mr. Lembkey.

Q. Do you remember anyone else being present?

A. I do not recall anyone else.

Q. That was in your office? A. Yes, sir.

Mr. CASSELL.—Q. Had Mr. Fritch been con-

(Testimony of John D. McKee.)

sulting you prior to that time concerning the affairs of the "Homer"?

A. Yes, sir.

Q. What was the situation of the "Homer," so far as you were concerned, at that time?

A. The Fritch interests in the "Homer" had been transferred to my name; the Fritch Company was ostensibly the managing owner and I was practically in control of the vessel, that is, of the Fritch interest in the vessel. [45—3]

Q. And that is the way he came to come to you?

A. Yes, sir.

Q. And it was desired both by you and by Mr. Fritch that the "Homer" should be sold to liquidate the debts of the company?

A. Mr. Fritch was very optimistic about the value of the boat and was sure the government would exercise the option and did not want the boat sold to anybody else. I wanted the boat sold as quickly as possible to liquidate the business.

Q. Did you at that time have any negotiations pending for the sale of the boat to somebody other than the Government if the Government did not make the purchase? A. Yes, sir.

Q. Were you yourself conducting negotiations looking to the sale of the "Homer" to someone other than to the Government if the Government did not purchase? A. Yes, sir.

Q. And did Mr. Fritch know that to be the fact?

A. Yes, sir.

Q. What took place at that meeting between your-

(Testimony of John D. McKee.)

self and Mr. Lembkey and Mr. Fritch on the occasion when Mr. Fritch showed you this telegram?

The COURT.—Who was Mr. Lembkey?

Mr. CASSELL.—He was the agent of the Department of Commerce and Labor for the control of the Seals Fisheries. That is a statutory position.

A. I met Mr. Lembkey for the first time that morning. Mr. Fritch brought him in to satisfy me that the arrangement would be consummated, that it was all right. I questioned [46—4] Lembkey about the telegram which they showed him and asked him what authority Mr. Earl had. Lembkey stated that Earl had an important position and stood high in the Department, and that any telegram like that was amply satisfactory, that I need not worry at all about that. I asked who the parties were who had executed the charter previously and was informed that Mr. Lembkey had executed it as the agent for the Seals Fisheries, or whatever it is; I then told Mr. Fritch that he should have Lembkey indorse an addition to the charter, indorse an extension on the bottom of the original charter. The charter was not in my possession; that was in Mr. Fritch's office as he was the managing owner. I had many of the other papers concerning the business of Fritch in the bank. I might state, Judge, that probably a year prior to this the Fritch company had gotten into financial difficulties and we had taken one of the young men of the bank and put him in charge of the Fritch business and Mr. Fritch was then representing his mother's interests, and we

(Testimony of John D. McKee.)

were then practically liquidating it.

Q. I will show you the last page of the charter-party, which is set forth in the agreed statement of facts, and ask you if you have seen that endorsement thereon, the endorsement at the foot of the page there.

A. I saw this charter-party before the endorsement was made and I saw it after the endorsement was made, but I did not see the endorsement made. That was made in some other office.

Q. Is that the endorsement you mentioned as having suggested that Mr. Lembkey should place upon that instrument?

A. Yes, I recommended that it be signed exactly as the original charter was signed. [47—5]

Q. Did Mr. Lembkey state, in your presence and in the presence of Mr. Fritch at that time, what he believed the reason of the Government to be for wanting the charter extended a period of 30 days?

A. Yes, sir.

Q. State what that was.

Mr. THOMAS.—I object to that, if your Honor please; it is not shown that any statement Mr. Lembkey would make would be binding upon the Government in this matter.

The COURT.—No, I think not. You have shown what took place, you cannot show the conversation.

Mr. CASSELL.—There is a deposition on file by Mr. Fritch. He is very sick; we took his deposition in place of bringing him here. In that deposition all of the correspondence is put in between Mr. Fritch

(Testimony of John D. McKee.)

and the Department leading up to this charter, and we believe that it is material. I am at a disadvantage in not having that before the Court, because I think it does show the materiality of the question I have just asked. I am going to take the liberty of reading just one portion of a letter to you, a letter dated December 2d. This correspondence is quite lengthy. This boat had been chartered by the Government every year for five or six years before. It was a peculiar boat. It was peculiarly adaptable to this work of the Government. Mr. Lembkey was anxious that the boat should be purchased by the Government. During the fall of 1910 there had been many negotiations between the Department and Mr. Fritch looking toward the purchase of the "Homer." It finally became apparent that the Government was not going to have sufficient funds available for the purchase of the "Homer" and they became desirous of extending the charter and putting in a clause of the character we have in clause 21 of the charter, whereby the Department [48—6] would be enabled to pay a portion of the purchase price and bring that amount up to an amount where the Department would have a fund available to pay on the balance of the purchase price. I will read one letter sent by Lembkey, writing for Mr. Bowers. This is the letter. (Reads Plaintiffs Exhibit No. 5.)

The COURT.—Your contract here is in writing; you can show what the situation was. Conversations and negotiations are not admissible here.

(Testimony of John D. McKee.)

Mr. CASSELL.—Unless your Honor is prepared to hold as a matter of law that the telegrams exclude the possibility of an extension of the charter, we think this is material.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 1.

Mr. CASSELL.—If your Honor please, I offer to prove by Mr. McKee that at that meeting Mr. Lembkey stated that it was his belief that the Government desired to extend the charter for 30 days and that one of its purposes for so doing was to bring the balance due under the contract under the charter-party down to an amount which the Government had available for the purchase of the "Homer."

The COURT.—Well, proceed; there is no objection.

Mr. THOMAS.—I will wait until he asks the questions. I thought your Honor had ruled.

Mr. CASSELL.—I had made an offer to prove.
[49—7]

The COURT.—We do not rule on offers to prove; we rule on objections to questions.

Mr. CASSELL.—Q. Will you state what was said by Mr. Lembkey at that time with regard to the purpose of the Department in desiring to extend the charter-party for 30 days.

Mr. THOMAS.—We object to that, if your Honor please, upon the ground that the charter-party shows on its face that anything Lembkey did was subject

(Testimony of John D. McKee.)

to the approval of the Department, and that Lembkey's private conversations with these gentlemen or his statements to them are in no way binding upon the Government.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 2.

Mr. CASSELL.—Q. Will you state what was the nature of the negotiations you then had pending for the sale of the "Homer" to other parties in the event that the sale to the Government did not go through in accordance with the terms of the provisions of clause 21 of the charter-party.

Mr. THOMAS.—We object to the question, if your Honor please, upon the ground that the answer would be immaterial, irrelevant and incompetent, and it would have no bearing at all on this case.

The COURT.—He has stated that there were negotiations and that is all that is material; the specific nature of them is not material. The objection is sustained. The fact is, Mr. Cassell, [50—8] I do not think it is material whether he had other negotiations. He had a right to want to sell the vessel to the Government, whether he had other people seeking it, or not.

Mr. CASSELL.—I do not desire to offer anything further in face of your Honor's ruling, but I want to show that the parties were acting in absolutely good faith, and that they actually did have prospects of selling the vessel.

(Testimony of John D. McKee.)

The COURT.—You don't have to show good faith in that regard.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 3.

Mr. CASSELL.—Q. Mr. McKee, I will show you a contract dated September 5, 1911, signed by yourself and Mr. W. S. Scammell, and I will ask you if that contract was made by yourself and Mr. Scammell on that date.

Mr. THOMAS.—If the Court please, I desire to object to any testimony concerning this contract as it does not appear to be within the issues—it does not purport to be a contract between the United States and the plaintiff here, and that it is immaterial, irrelevant and incompetent.

Mr. CASSELL.—This purports to be a contract between Mr. McKee and Mr. Scammell whereby Mr. Scammell was to purchase the "Homer" at a stated price. The contract contains this provision: 'If and when the charter on the steamer "Homer," in favor of the United States Government, shall terminate, which is [51—9] expected to be about 30 days from this date, and if the United States Government does not exercise its option to purchase said steamship "Homer," then the interest of the undersigned in the steamship "Homer" is sold and assigned to said Scammell at the rate of \$35,000 for the entire interest in the vessel.'

The Court thereupon sustained respondents' said

(Testimony of John D. McKee.)

objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 4.

Mr. CASSELL.—I will offer this as “Plaintiffs' Exhibit No. 1 for Identification.” The said contract was thereupon marked Plaintiffs' Exhibit No. 1 for Identification and was in the words and figures following:

**[Plaintiffs' Exhibit No. 1 for Identification—
Memorandum, Dated September 15, 1911.]**

San Francisco, California, September 15, 1911.

Receipt is acknowledged by the undersigned from Mr. Walter S. Scammell of the sum of One Thousand (\$1000) Dollars, being payment on account of the purchase of the SS. “Homer” upon the following conditions:

If and when the charter now in force upon the SS. “Homer” in favor of the U. S. Government, which charter contains an option in favor of the U. S. Government to purchase the SS. “Homer,” shall terminate (which is expected to be about [52—10] thirty days from this date), and if the U. S. Government does not exercise its option to purchase the said SS. “Homer,” then the interest of the undersigned in the said SS. “Homer” is to be sold, assigned and transferred to the said Walter S. Scammell upon payment therefor at the rate of thirty-five thousand (\$35,000) dollars for the entire vessel, as follows:

Cash upon delivery of Bill of Sale, eight thousand (\$8,000) dollars, (including the deposit of \$1,000,

herein acknowledged) the balance in five equal notes payable to the order of the undersigned, six, twelve, eighteen, twenty-four and thirty months from date of transfer, bearing interest at six per cent. per annum, secured by first mortgage upon the said interest in the said SS. "Homer"; the maker and form of the said mortgage to be mutually satisfactory to the said Scammell and the undersigned.

If the U. S. Government exercises its option to purchase the said SS. "Homer," the above deposit of \$1000 is to be returned upon the order of the said Scammell.

If the option to purchase the said SS. "Homer" is not exercised by the U. S. Government, and the purchase of the said SS. "Homer" is not completed by the said Scammell (upon the conditions above set forth) within fifteen days after notice to him by the undersigned that the option of the U. S. Government [53—11] has not been exercised, then and in that event the above-mentioned deposit of \$1000 shall be forfeited to the undersigned.

The interest of the undersigned in the said SS. "Homer" to be transferred free and clear of all liens or indebtedness.

Insurance premium to be prorated.

Time is of the essence of this memorandum.

(Signed) JOHN D. McKEE.

Approved by:

W. S. SCAMMELL.

Witness:

W. J. WOODSIDE. [54—12]

Mr. CASSELL.—Q. Will you state when you first heard that the Government had declined to recognize the extension of the charter, the alleged extension of the charter, contained in the telegrams we have referred to?

Mr. THOMAS.—We object to this as immaterial.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 5.

Mr. CASSELL.—Q. Was it the belief of yourself, at that meeting and at all times thereafter during the months of September and October, 1911, that that charter had been extended by those telegrams?

Mr. THOMAS.—I desire to object to that question, your Honor, upon the ground that the belief of Mr. McKee is in nowise binding upon the defendant.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 6.

[Deposition of J. Homer Fritch, for Plaintiffs.]

The deposition of J. Homer Fritch, a witness on behalf of plaintiffs was thereupon read, said deposition having been taken by stipulation entered into between the parties and having been duly returned and filed herein.

The WITNESS.—I was the manager and president of J. Homer Fritch, Inc., during practically all of the time of its existence,— [55—13] ever since

(Deposition of J. Homer Fritch.)

1906. As manager of said corporation I had the management of the steamer "Homer." The steamer "Homer" was under charter to the United States Government prior to 1911, particularly to the Seal Fisheries of the Department of Commerce and Labor. It had been under charter to the Government for a number of years prior to 1911 and had been used by the department for the purpose of carrying supplies to the Pribilof Islands and bringing back skins from those islands. It was used each year by the Department from three to four months, generally the months of June, July, August, and a portion of the month of September.

Q. Who represented the Department in chartering the vessel from you?

A. Well, it was the officers of the Department; there was a number of them.

Q. Can you name some of them?

A. Yes. There was Lembkey; there was one that was the head of the Department; he was one of the principal ones.

Q. Did you have any dealings with Mr. Bowers?

A. Bowers,—yes.

Q. What were his initials, do you recall?

A. Bowers? No.

Q. George M. Bowers, was it?

A. George M. Bowers.

Q. How long prior to 1911 had you been dealing with Mr. Bowers?

A. I don't know—two or three years.

Q. How long had you known Mr. W. I. Lembkey prior to 1911?

(Deposition of J. Homer Fritch)

A. Prior to 1911, possibly—oh, let's see; I knew him first—I went on the steamer with him in 1898.

[56—14]

Q. 1898? A. Yes.

Q. And had you known him continuously since that time? A. Yes; met him every year since.

Q. How long had he been connected with the Department of Commerce and Labor prior to 1911?

A. Prior to 1911?

Q. Yes.

A. About, I think, eighteen to twenty years.

Q. Had you communicated with him concerning the charter of the steamship "Homer" each year?

A. No—oh, yes—well, no, not each year.

Q. On many different occasions?

A. Oh, yes; frequently. He was the principal business man.

Q. He was the agent of the Seal Fisheries?

A. He was the agent of the Seal Fisheries and all the actual business was done with him, except the chartering of the charter-party and that was frequently done by him.

Q. He made all the preliminary arrangements, did he not? A. Yes.

Q. Had any negotiations between you representing the owners of the steamship "Homer" on the one hand and Mr. Lembkey representing the Department of Commerce and Labor on the other hand been carried on looking toward the purchase of the steamer "Homer" prior to 1911?

A. Prior to 1911?

(Deposition of J. Homer Fritch.)

Q. Yes. A. There had been some talk of it.

Mr. CASSELL.—Q. How long prior to 1911 had there been talk of the Government purchasing the “Homer”? A. Oh, some few years. [57—15]

Q. What was the reason, if you know, for the Government desiring the “Homer”?

A. Because she seemed to be about adapted for their use; she seemed to be well adapted for their use.

Q. Who had charge as captain of the “Homer”?

A. Captain Donaldson.

Q. Was he a man experienced in those waters?

A. Yes.

Q. Had the Government made any prior offers looking toward the purchase of the “Homer” prior to 1911?

A. No. There had been more or less talk *about every* year; there was some talk of purchase.

Q. During what months of each year did the Government ordinarily charter the “Homer”?

A. June, July, August and September.

Q. And what period of each year did you ordinarily enter into negotiations looking toward the charter for the next year? A. Usually during the fall.

Q. During the fall of 1910 did you enter into negotiations with the Department either through Mr. Lembkey or Mr. Bowers, or any official of the Department, looking toward the charter of the “Homer” for the year 1911? A. Yes.

Q. Did you have any correspondence with either of those gentlemen or any officials of the Department?

(Deposition of J. Homer Fritch.)

A. Yes,—a number of gentlemen there; I don't remember exactly whom.

Q. Did you have correspondence of that character at that time with Mr. Lembkey?

A. Yes. [58—16]

Q. And Mr. Bowers? A. Yes.

Q. And with other officials of the Department?

A. Yes.

Q. In that correspondence did you deal with the question of chartering the "Homer" for the year 1911? A. Yes.

Q. And also did that correspondence deal with the subject of the possible purchase of the "Homer" by the Department? A. Yes.

Fourteen letters and nine telegrams were thereupon produced and it was stipulated that said letters and telegrams constituted the correspondence referred to in the witness' testimony, and that the copies offered were true and correct, and that said letters and telegrams were actually sent, at the respective dates which they bore, by the parties signing them, and that they were received in due course by the parties to whom they were respectively addressed. All of said letters and telegrams antedated the charter-party of April 24, 1911. Said letters and telegrams were thereupon offered in evidence by plaintiffs for the purpose of explaining any ambiguity that might be said to exist in the charter-party, or in any clause thereof, or in the agreement arrived at, bearing on the alleged extension of the charter-party.

(Deposition of J. Homer Fritch.)

Counsel for respondents thereupon objected to the admission of said correspondence, or any part thereof, upon the ground that the same was incompetent, irrelevant and immaterial, and upon the ground that all negotiations with reference to the chartering of the "Homer" were merged in the charter-party of April 24, 1911. The Court thereupon overruled said objection and admitted the following letters and telegrams in evidence: [59—17]

**Petitioners' and Plaintiffs' Exhibit No. 2 [Letter,
November 1, 1910, Fritch to Lembkey].**

November 1, 1910.

Mr. W. I. Lembkey,
Dept. of Commerce & Labor,
Washington, D. C.

Dear Lembkey:

Referring steamer "Homer" I have been thinking over this matter considerably within the last month and I have made up my mind that I will inform you and Mr. Bowers of the exact condition of things here so that you can make your arrangements accordingly and at the same time let me know what your intentions are in regard to the matter. In the first place ever since returning from Alaska I have had her under daily charter to the Pacific Coast Steamship Company and the ship is making good, in fact she has exceeded their expectations both in the amount of business offered and the amount of cargo carried and I have no doubt that she is making good money for them. They have been after me continually to tie the ship up to them for a year.

This, up to the present time, I have absolutely refused to do, but I have signed a Charter to extend until the first of March. I now have two or three of the different Iron Works in San Francisco figuring on installing a new boiler. This can be done during the month of March without any trouble providing, of course, that I place the order for this boiler forthwith.

I have always desired to do your business, preferably to sell the ship to the Government and work out the business on the lines talked of before you left, in regard to Captain, [60—18] etc., and this can be carried out provided the Government should see fit to purchase the steamer.

Of course, if the contract is made for the new boiler I should expect this contract to be assumed by the Government, providing they decide to purchase. Should the matter of purchase fall through, it is then up to the question of charter. The business that the "Homer" is at present engaged in, while it is profitable during the winter months it would be extra good during the summer months and as the Pacific Coast Steamship Company's *principle* business would be in the summer they naturally wish to tie this ship up so that they would have the use of her during the summer. On my part I am very anxious to place the ship in such a way that she can make money enough to pay for the installing of the new boiler. I hope I have made everything clear to you and that you will readily see my position in the matter. I wish to do the best I possibly can for the ship and owners and at the same

time I want to treat fair and square with your people in every respect.

Kindly confer with Mr. Bowers in regard to the matter and let me know your ideas so that I may act accordingly.

With very best wishes to your good self, Mrs. Lembkey, Mrs. Bowers and Mrs. Judge,

I remain,

Very truly yours,
J. HOMER FRITCH. [61—19]

**Petitioners' and Plaintiffs' Exhibit No. 3 [Letter,
November 12, 1910, Commissioner Bowers to
Fritch.]**

DEPARTMENT OF COMMERCE AND LABOR,
Bureau of Fisheries,
Washington.

November 12, 1910.

Mr. J. Homer Fritch,
Fife Building,
San Francisco, Calif.

Sir:

Replying to your letter of the 1st instant, with reference to the charter or sale of the "Homer" to the Government for use of the Seal Islands, you are requested, as a preliminary to the consideration of the question, to state the lowest price at which the "Homer" might be chartered for the summer; also, the lowest cash price at which she might be purchased outright. The charter price quoted should be predicated upon the installation of a new boiler and a square-sail for the foremast before the season of 1911 begins.

Please state also your idea of the cost of a new boiler and installation of the same.

Respectfully,

(Signed) GEORGE A. BOWERS,

Commissioner. [62—20]

**Petitioners' and Plaintiffs' Exhibit No. 4 [Letter,
November 23, 1910, Fritch to Bowers].**

November 23, 1910.

George M. Bowers,

Bureau of Fisheries,

Dept. of Commerce & Labor,

Washington, D. C.

Dear Mr. Bowers:

I beg to acknowledge receipt of your favor of November 12th, 1910, and in answer to the same I will say, the new boiler installed in the steamer "Homer" will cost about \$6,500.00. The United Engineering Works of San Francisco have agreed to supply a boiler identical with the one that the "Homer" has and with ample capacity to generate enough steam to do all the work necessary on board the ship; that is to say, they will take the old boiler out and replace the new one with all necessary fittings, piping, etc., and the same to pass inspection by the United States Inspectors of hulls and boilers for a lump sum of \$6,500.00 and will agree to do the work within thirty days after the ship is turned over to them. I wish to explain in detail my position in regard to the vessel so that you may know exactly how to act in the premises. As I informed you before the ship is under charter, at the present time, to the Pacific Coast Steamship Company until

the 1st of March, 1911. The Pacific Coast Steamship Company are very anxious to close a further charter with me extending over a period of one year, as they contend and very justly too, that if they use the ship through the winter and work up a business for her they [63—21] are very anxious to keep her through the summer, which is their busiest time. Furthermore, there are some parties here and in Seattle who also wish to charter the vessel for the season for the Kuskokwim River for the summer.

Personally I must say that I lean to the Government business, particularly as I have done the business of the Seal Islands so long and it has always been very satisfactory in every way. I should much prefer to make a sale of the ship outright and with this object in view I am perfectly willing to agree to deliver the ship to the Government with a new boiler installed, new *propellers*, and in thoroughly good sea-going condition, including square sale for the sum of \$43,500.00 net. Furthermore I will also agree to allow Captain Donaldson to take the ship during your season each year while he is in my employ. I have talked with him in regard to this matter and I have agreed to place a man in charge of the Steamer "Carlos" each year while he is away on your business. I will further agree to attend to your business here, giving you the use of my offices, clerks, stenographers, telephones, etc. under an agreement for a small consideration for disbursements, etc. the agreement being that there shall be no rent charged, if the present offices are

large enough to accomodate the business, which I think they are, should you desire to charter. The prospects for the coming summer are that we will be short on tonnage and in fact there is a very active market on tonnage at the present time in San Francisco. I have received several very flattering offers, however, I will be perfectly willing to charter to your people under the same conditions as last year at a daily rental of \$160.00 per day. [64—22]

I consider the new boiler will save the difference in rental between this price and last year's price in the consumption of coal, to say nothing of the *increase* sufficiency of the ship. You will greatly oblige me if you will give this matter your immediate consideration, as I am holding the other propositions up until such time as you shall indicate what you propose doing for futures.

You will understand friend Bowers that I am trying to do what I consider for the best interests of the Steamer "Homer," and her owners. At the same time, as I have said before, I am anxious to do your business and I sincerely hope that you will see your way clear to purchase the ship outright. With a new boiler, and the thorough overhauling which I propose to give her, you no doubt would have a good ship and one which has proven to be just about what you want to do your business.

With best wishes to yourself, Mr. Lembkey and Mr. Judge and hoping to get an early reply.

I remain,
yours Very truly,
J. HOMER FRITCH.

**Petitioners' and Plaintiffs' Exhibit No. 5 [Letter,
December 2, 1910, Lembkey to Fritch].**

DEPARTMENT OF COMMERCE AND LABOR.

Bureau of Fisheries.

Washington.

Personal.

December 2, 1910.

My dear Mr. Fritch. [65—23]

Your letter of November 23, regarding the purchase of the "Homer" is to hand. The Commissioner wished me to write you a personal letter about the matter.

The Commissioner desires to purchase the "Homer." The terms of purchase, however, require some adjustment. The situation is about as follows, and, as a business man, you will readily grasp it:

The appropriation, of which we have an unexpended balance this year and from which the purchase of the vessel was contemplated, has been decided to be not available for purchase of a vessel, although it can be used for chartering. We have, however, another appropriation of \$20,000, which can be used for purchase outright of a vessel for Alaska. The object, therefore, if a vessel should be purchased, is to pay the \$20,000 down as part payment of the purchase money, and to have the balance of the latter paid as charter money from the other appropriation.

If we were to charter the "Homer" this spring, therefore, it would be on the understanding that the charter money so paid should apply on the purchase

price. Then we could prolong the charter, perhaps, by laying her up in the Creek or by some other arrangement, until the charter money would reach an amount equal to the balance of the purchase price.

It is not good policy to have the charter-rate greater than it was last season (\$142.50). We would also like to be assured of the efficiency of the new boiler before installation. The question of price and terms would have to be discussed. I am giving you, however, a statement of the exact situation regarding funds and our limitations regarding them, and [66—24] invite an early expression of your views on the question whether an understanding could be reached on the basis outlined. Let me have any suggestions you may wish to offer regarding an arrangement.

The Commissioner leaves tonight for Europe. He sends his regards, as do all of us. We are all wearing "1915" buttons and rooting for San Francisco.

Very truly yours,

(Signed) W. I. LEMBKEY.

Mr. J. Homer Fritch,

Fife Building,

San Francisco, Calif.

**Petitioners' and Plaintiffs' Exhibit No. 6 [Letter,
December 8, 1910, Fritch to Lembkey].**

December 8, 1910.

Mr. W. I. Lembkey,
Dep't. of Commerce & Labor,
Bureau of Fisheries,
Washington, D. C.

Dear Mr. Lembkey:

I beg to acknowledge receipt of your favor of December 2d and in answer will say that I look favorably upon your proposition and that I have no doubt that we can come to terms on the lines indicated by your communication. This is merely a matter of arranging the details as to the daily rental of the ship. That matter can be adjusted perfectly satisfactory, as it would not make any particular difference as to the amount per day, provided the money was to be [67—25] applied as you suggest. As I understand your proposition you are willing to pay the \$20,000.00, cash. The balance of the money to be paid in the way of rental year by year. This will be perfectly satisfactory to me. As to the matter of details I would like you to indicate how you would want this done. I would suggest a out and out Bill of Sale upon making the first payment. The balance of purchase money to be secured by a mortgage on the ship or if you did not wish to do it in this way, it might be done by making the payment of \$20,000.00 and an agreement for a Bill of Sale upon the final payment. Ship to be insured in favor of both parties to secure interests as they may ap-

pear. On the strength of your communication to me, I will proceed at once to order the boiler and make all arrangements to have the vessel ready for your business by the first of May, 1911.

Any further suggestions or recommendations that you can make in reference to the matter will be duly appreciated.

In sending communications in regard to this matter, will you kindly mark all envelopes personal, so that the whole matter will come direct to me.

Very truly yours,

J. HOMER FRITCH.

**Petitioners' and Plaintiffs' Exhibit No. 7 [Letter,
December 15, 1910, Lembkey to Fritch].**

DEPARTMENT OF COMMERCE AND LABOR,
Bureau of Fisheries.

Personal. December 15, 1910, Washington,
[68—26]

My dear Mr. Fritch:

I beg to acknowledge the receipt yesterday of your letter of the 8th instant, in which you state that the idea conveyed in my personal letter of the 2d instant, regarding the purchase of the "Homer," is favorably received.

I must state frankly that, at first, I partially misunderstood the Commissioner's idea regarding the arrangements for purchase. It is his desire to make a charter in the usual way as though the question of sale were not under discussion; to allow the charter-money to accrue to an amount equal to the purchase price, less \$20,000; and then, being in a position to state that he virtually could buy the ship for

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\$20,000, he would proceed to do so. This is the same proposition as contained in my former letter, except that the payment of the \$20,000 occurs at the latter end of the transaction instead of at the beginning. I hope this will make no difference in your calculations.

If I had the opportunity of speaking to you personally, I would be able more readily to explain the situation and to discuss price and terms. However, let me know how you regard the foregoing proposition.

Very truly yours,

(Signed) W. I. LEMBKEY.

Mr. J. Homer Fritch,

San Francisco, Calif. [69—27]

**Petitioners' and Plaintiffs' Exhibit No. 8 [Letter,
January 3, 1911, Fritch to Lembkey].**

January 3, 1911.

Mr. W. I. Lembkey.

c/o Commissioner of Fisheries.

Dep't. of Commerce & Labor.

Washington, D. C.

My dear Mr. Lembkey:

I beg to acknowledge receipt of your favor of December 15th and in answer will say, the proposition as indicated in your communication of the 15th is entirely different from the one made on December 2nd and this would necessitate an entirely new mode of procedure. How would a proposition be for a Charter by the year, a certain amount payable monthly, to commence at once, making different prices, while laid up and while in commission with

full new crew on board, suit you?

Suppose for instance that you would take the Ship now or as soon as these arrangements could be entered into at a net price of \$38,000.00, payable as follows: Charter money to commence at once at the rate of \$100.00 per day while laid up and \$142.50 per day while running. All expenses of wages, provisions, etc. to be deducted from these amounts and the net amount to be applied on account of purchase price. You to pay for the new boiler and any other repairs that you may wish done. The balance or last payment of \$20,000.00 to be made when the Ship has earned \$18,000.00 together with the money spent for repairs and interest on deferred payment and insurance. It seems to that an agreement on these lines [70—28] can be formulated, whereby we can cover both ends. The larger the amount paid as rental the sooner you could take the Ship over and possibly you would wish to increase the amount while laid up. That is to say, suppose we made the Charter at once at an agreed sum of say \$142.50 for say a period of two or three years, with an understanding that when she had earned \$18,000.00 as outlined above this amount to be clear of all expense of maintenance, insurance, interest, etc., you then to pay \$20,000.00 for the ship.

Kindly take this matter up with Mr. Bowers and give me your ideas of how that would suit you. Kindly let me know about this matter as soon as possible as there are a number of parties talking purchase and Charter. I now have a proposition from some Alaska parties for a Charter for the

Summer, whereby the Ship can earn \$18,000.00 outside of interest and insurance, but it is a bad place to go and I have no doubt the insurance, if insurable at all, will be very heavy. If I can make a satisfactory arrangement with you, I prefer to do business with your Department with a prospect of taking up some other matters that may be a benefit to both, and again, if we can close a deal, I will be in touch with the Department for some little time and should anything occur whereby my services should be wanted I will be in a position to avail myself of any proposition you should wish to present.

With best wishes to Mr. Bowers, Mr. Judge and your good self and wishing you all the compliments of the season,

I remain,

Very truly yours,

J. HOMER FRITCH. [71—29]

**Petitioners' and Plaintiffs' Exhibit No. 9 [Letter,
January 12, 1911, Fritch to Lembkey].**

January, 12, 1911.

Mr. W. I. Lembkey,

c/o Commissioner of Fisheries,

Dep't. of Commerce & Labor,

Washington, D. C.

Dear Lembkey:

I wrote you a letter some little time ago in reference to the "Homer," but it is a little early yet to expect a reply. However, I wish you would take the matter up with Mr. Bowers and let me know your decision just as soon as possible. In connection with this matter there was a proposition that

came up yesterday from Captain Cottell of the Whalers, "Belvedere" and "Karlock." He will have from 500 to 1,000 barrels of whale oil in Dutch Harbor by the middle of June and he is very anxious to have that brought to San Francisco. As to the day of its arrival in Dutch Harbor he can arrange that, so as to fit in with your schedule up there, should you decide that you wish to take the oil. He will guarantee at least 500 barrels, or will pay \$500 freight unless he does not supply the 500 barrels. All over this amount is to pay \$1.00 per barrel, and he thinks he will have at least 800 to 1,000 barrels. The Steamer to use her winch in loading the same and Captain Cottell to supply the labor for stowing the same in the Ship's hold. This, I figure, would be fairly good freight as it handles quickly. However, this is a matter which I wish to bring to your attention as it may cut some figure in your calculations with the Steamer. [72—30]

The chances are there may be some other South bound freight we could pick up if we should so desire, all of which would help to pay the expenses of the vessel.

With best wishes to you all and hoping you can see your way clearly to accept my last proposition.

I remain,

Very truly yours,

J. HOMER FRITCH.

**Petitioners' and Plaintiffs Exhibit No. 11 [Letter,
January 30, 1911, Lembkey to Fritch].**

DEPARTMENT OF COMMERCE AND LABOR.

Bureau of Fisheries,
Washington.

January 30, 1911.

My dear Mr. Fritch:

I have delayed answering your last two letters until I could learn something definite in relation to the matter of the "Homer."

From what I can see at present, and without going into detail, I can say regretfully that there is little chance of purchasing the "Homer" until at least after July 1, next. This arises mainly from questions raised as to the propriety of the use for that purpose of some of the funds mentioned in my previous letters. It is a fact, however, that we will charter the "Homer," if the charter can be arranged to suit.

The main point in the matter, however, is the installation of the boiler. You will have to do that in time for the vessel to sail on June 1 proximo. While it will necessitate [73—31] the outlay of funds, it will increase the value of the ship and will return in purchase money.

The terms of the charter, etc., can be discussed later. My object in writing now is to ask you to go ahead with the boiler. With that done, we can use the vessel under charter, which we could not do without it.

Mr. Bowers is still in Europe and the date of

his return is not known. His lengthy stay is understood to be due to ill-health. I saw Mr. Davis the other day at the Willard.

With my kindest regards I am, believe me,

Sincerely yours,

(Signed) W. I. LEMBKEY.

**Petitioners' and Plaintiffs' Exhibit No. 12 [Letter,
February 4, 1911, Fritch to Lembkey].**

February 4, 1911.

Mr. W. I. Lembkey,

Dep't. of Commerce & Labor,

Washington, D. C.

Dear Mr. Lembkey:

I beg to acknowledge receipt of your favor of January 30th and in answer will say that I am very much disappointed at what you say in regard to the purchase of the Steamer "Homer." However, I have ordered the boiler and the boiler will be installed and the Ship ready for sea by the middle of May. Some two weeks ago, James McMillen came into the office and informed me that he was going on to Washington with a view that he was going to try and get the position of Government Representative in San Francisco. He also [74—32] desired that I should make a price to him on the Stmr. "Homer" for Charter to the Government. He told me that he had been looking up the Steamer "Grace Dollar" and also the "Phoenix." A day or two ago I met the owner of the "Phoenix" and he told me that Mr. McMillen had been there to see him with some representative from your Department. He did not know the

gentleman's name but he claimed to have the power to charter the vessel and he had looked over the "Phoenix" with Mr. McMillen and he said that he was prepared to do business. I thought this proceeding very strange, in view of the fact that I had been negotiating with your people and on the strength of these negotiations I had turned down several other propositions for charter of the "Homer," particularly, the one to the Kuskokwim Commercial Co. This proposition would have been, no doubt, a good one as I refused a six months Charter, to commence about May 15th at a daily rental of \$160.00 per day, Government form. I naturally came to the conclusion that the whole business as far as McMillen was concerned was of Jimmie looking for a little commission from this end. However, I am leaving this matter all in your hands and if there is any prospect of the Government not requiring the "Homer" I wish you would inform me as there are other opportunities offering and I do not care to leave the matter in a uncertain condition. She is at present under charter to the Pacific Coast Co., this charter to end April 15th. That will give me a full month in order to get the vessel in condition for your business. I hope the Department will not leave me in the lurch on this proposition, as I have held the vessel out [75—35] for you and it would not be right to have something turn up whereby I should lose the outside opportunities for other business.

I am very sorry to hear that Mr. Bowers is so indisposed and I sincerely hope that he will be im-

proved before I hear from you again. I sent you a little telegram on January 30th, hope you received it all right.

* * * * *

With best wishes, to you all,

I remain,

Very truly yours,

J. HOMER FRITCH,

Petitioners' and Plaintiffs' Exhibit No. 14 [Telegram, March 8, 1911, Commissioner to Fritch].

(Telegram—Postal Telegraph—Commercial Cables.)

513-Ch. Wx. 40-Govt.

Washington, D. C. Mar. 8, 1911.

J. Homer Fritsch,

Fife Bldg., San Francisco, Cal.

Provided new boiler installed by May fifteen will charter Homer for one Hundred forty two fifty per day with option to buy applying charter money on purchase price. Wire answer.

COMMISSIONER OF FISHERIES.

Petitioners' and Plaintiffs' Exhibit No. 15 [Telegram, March 8, 1911, Fritch to Commissioner].

(Postal Telegraph Commercial Cables Night Lettergram.)

San Francisco, March 8, 1911.

Commissioner of Fisheries,

Washington, D. C. [76—34]

Wire March 8th received. New boiler will be installed and ship ready for service May 15th. Will accept your proposition all terms and conditions of last years charter to remain the same and an added

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option of purchase. The net charter money to apply on purchase price. Answer.

J. HOMER FRITCH.

Petitioners' and Plaintiffs' Exhibit No. 16
[Telegram, March 9, 1911—Commissioner to Fritch].

(Telegram — Postal-Telegraph — Commercial Cables.)

552 chs. 27 Govt.

Washington D C Mar. 9, 11.

J. Homer Fritch,

Fife Bldg Sanfran. Cal.

Your telegram eighth proposition to charter Homer accepted price at which vessel might be purchased to be determined later.

COMMISSIONER 135p.

Petitioners' and Plaintiffs' Exhibit No. 17
[Telegram, March 30, 1911—Commissioner to Fritch].

(Telegram — Postal Telegraph — Commercial Cables.)

303 chs. 51 Govt.

Washington D C Mar. 30-11.

J. Homer Fritch,

Fife Bldg Sanfran cal

Prepare sign and forward at once for approval six copies charter homer in accordance terms agreed upon in recent telegrams form and substance in other respects same as last years vessel to be delivered in seaworthy condition with new boiler may fifteen.

BOWERS COMMR. [77—35]

Petitioners' and Plaintiffs' Exhibit No. 20
[Telegram, April 6, 1911, Commissioner to
Fritch.]

(Telegram — Postal Telegraph — Commercial
Cables.)

515 CH. OD. 57 Govt.

Washington, D. C., Apr. 6, 1911,

J. Homer Frieth,

Fife Bldg.,

San Francisco, Calif.

Charters furnished by you for Homer not witness
lack corporation seal. Also lack clause that charter
money apply toward purchase. Prepare and mail
immediately charters on form used last year namely
time charter government form as agreed in your
telegram March eight last answer.

GEORGE M. BOWER,
Commissioner of Fisheries.

Petitioners' and Plaintiffs' Exhibit No. 21
[Telegram, April 7, 1911, Commissioner to
Fritch.]

(Telegram — Postal Telegraph — Commercial
Cables.)

314-Ch. Wx. 21-Govt.

Washington, D. C., April 7, 1911.

J. Homer Fritch,

Fife Bldg., San Francisco, Cal.

Will prepare charter here accordance your tele-
gram sixth and mail for your signature.

COMMISSIONER.

Petitioners' and Plaintiffs' Exhibit No. 22
[Letter, April 8, 1911—Acting Commissioner to Fritch].

DEPARTMENT OF COMMERCE AND LABOR.

Bureau of Fisheries,
Washington. [78—36]

April 8, 1911.

Mr. J. Homer Fritch,
Fife Building,
San Francisco, Calif.

Sir:

In accordance with the suggestion in your telegram of the 6th instant, there are transmitted 6 copies of the form of charter-party used last year for the steamer HOMER. It is desired that you sign the enclosed copies in a manner conformable to the appropriate resolutions of your corporation and, having had these signatures witnessed and the corporate seal attached, that you return them to this Bureau with as little delay as practicable.

Respectfully,

H. DUNLAP,
Acting Commissioner.

6 enclosures.

Q. Mr. Fritch, did the Government require anything in the way of repairs to the "Homer" before it would charter the "Homer" for the season 1911?

A. She always had to be put in repairs; always had to drydock her and put all repairs into her in perfect order before she started. It is a long trip.

Q. Was there anything particular that was needed

(Deposition of J. Homer Fritch.)

in the way of repairs that were required before the Government would charter her for that particular year; was a new boiler required?

A. A new boiler. [79—37]

Q. What was the cost of installing that new boiler? A. About eight thousand dollars.

Q. Was that new boiler installed by you solely in the expectation of chartering the “Homer” for the season or with the expectation of selling the “Homer” to the Government?

A. I guess it was a little of both; I can’t say that it was.

Mr. THOMAS.—I desire to object to that question and ask that the answer be stricken out on the ground that it calls for a conclusion of the witness.

The Court thereupon sustained respondents’ said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs’ Exception No. 7.

Mr. CASSELL.—Q. Mr. Fritch, would you have installed a new boiler on the “Homer” if you had not been in the expectation of selling the “Homer” to the Government. As its managing owner would you have expended the sum of eight thousand dollars in the installing of a new boiler in the “Homer” if you had not been in the expectation of selling the “Homer” to the Government?

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondent’s said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plain-

(Deposition of J. Homer Fritch.)

tiffs' Exception No. 8. [80—38]

Mr. CASSELL.—Q. Mr. Fritch, I show you a letter dated December 2d, 1910, purporting to be signed by W. I. Lembkey, and upon the stationery of the Department of Commerce and Labor, addressed to you, and being one of the letters heretofore offered in evidence, and I ask you if you received that letter during the month of December, 1910?

A. This is all right; I remember receiving that.

Q. I show you a letter dated December 15th, 1910, purporting to be signed by W. I. Lembkey, and upon the stationery of the Department of Commerce and Labor, addressed to yourself, and being one of the letters heretofore offered in evidence, and received in evidence, and ask you if you recall receiving that letter during the month of December, 1910; do you recall receiving that letter? A. Yes.

Q. Mr. Fritch, you will recall that clause 21 of the charter-party, which is embodied in the agreed statement of facts in this action, read as follows: "That the Charterers have the option, at any time during this Charter, of purchasing the said vessel for the sum of forty-five thousand (\$45,000.00) Dollars, against which any amount paid for the hire of the said Vessel, less cost of operation, shall be set off and deducted, but that the Purchasers shall pay interest at the rate of 6% per annum and insurance on the amount of purchase money from the date of this Charter to the completion of sale." In other words, under the charter-party which you subsequently made with the Government, the Govern-

(Deposition of J. Homer Fritch.)

ment had the right at any time during the charter to purchase the "Homer" from you for \$45,000, allowing the amount in part payment of whatever the Government paid to you as hire for the summer of 1911. Will you state whether or [81—39] not it was your expectation in inserting that clause in the contract that the Government would be able to pay cash for the balance due on the purchase price of the "Homer" at the expiration of the summer after the amount of hire had been paid for the summer months by the Government?

Mr. THOMAS.—I object to that question on the ground that it calls for the conclusion of the witness as to what his expectation was.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 9.

Mr. CASSELL.—Q. Mr. Fritch, I will ask you if in granting the Government an option to purchase the "Homer" by this 21st clause of the charter-party, you had in mind the representation made to you in the two letters to which I have referred, namely, the letters of December 2d, 1910, and December 15th, 1910, to the effect that the Department of Commerce and Labor would have a fund sufficient to pay for the balance of the purchase price of the "Homer" after it had paid the amount of hire for the summer months.

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondents' said

(Deposition of J. Homer Fritch.)

objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 10. [82—40]

Mr. CASSELL.—Q. Mr. Fritch, I ask you if you would have granted the Government this option to purchase the "Homer" had you not believed that the Department of Commerce and Labor had a fund sufficient to pay for the "Homer," as stated in these letters?

Mr. THOMAS.—I object to that question on the ground that it calls for the opinion or conclusion of the witness.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 11.

Mr. CASSELL.—Q. Did you believe that they had a fund of \$20,000 available?

A. Yes; I am pretty sure they had it.

Q. And did you believe they had this fund of \$20,000 referred to in the letters of December 2d, 1910, and December 15th, 1910, to which I have referred? A. Yes.

Counsel for respondents thereupon moved to strike out the answers to the foregoing questions upon the same grounds as those specified in the last exception. The Court thereupon sustained said objection, to which counsel for plaintiffs excepted; and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 12. [83—41]

Q. Mr. Fritch, do you remember how many trips

(Deposition of J. Homer Fritch.)

the "Homer" took for the Government in 1911.

A. I think there were two.

Q. Do you remember about what time the "Homer" returned from its last or second trip?

A. September, I think.

Q. There is set forth on page 11 of the agreed statements of facts in this case the following telegram: "Washington, D. C. September 12, 1911. J. Homer Fritch, Inc., San Francisco, Cal. We would like to have option for purchase of "Homer" extended thirty days on terms mentioned in paragraph 21 of charter otherwise charter to terminate as provided therein. Answer. Signed, Charles Earl, Acting Secretary." Do you recall receiving that telegram on the 12th day of September, 1911?

A. Yes.

Q. Do you recall what time of day you received it?

A. I think it was along about noon.

Q. What did you then do with it?

A. Why, I don't remember.

Q. Did you show it to Mr. Lembkey?

A. Yes, I showed it to Lembkey.

Q. Where did you meet Lembkey?

A. Let's see; I met Lembkey in the office, I think, or in the bank; I ain't sure which, whether I did not meet him in the bank.

Q. Did you have any discussion with him concerning that telegram? A. Yes.

Q. Will you state what that discussion was? [84—42]

A. Well, I don't remember exactly how. It

(Deposition of J. Homer Fritch.)

seemed to be very favorable; it looked as if the Government was going to take it, and one thing and another, and we sent a telegram on acknowledging that. Isn't there a telegram there?

Q. Mr. Fritch, I will read you a telegram set forth in page —— of the agreed statement of facts as follows: "San Francisco, September 14th, 1911. Acting Secretary Department of Commerce and Labor, Washington, D. C. As requested in your telegram of 12th instant charter Steamer "Homer" hereby extended for further period of thirty days from September 13th, 1911, with option of purchase. Signed J. Homer Fritch, Inc." I will ask you if that is the telegram to which you just referred as one which you sent in reply to the telegram of September 12th?

A. Yes.

Q. State if you remember when you sent that telegram, where you were when you sent it?

A. No, I don't.

Q. Where did you go with Mr. Lembkey when you showed him that telegram, the telegram of the 12th, the one that you received from the Commissioner?

A. That is the question in my mind, whether that was not the telegram I showed him in the bank.

Q. Who else was present at that meeting in the bank? A. Mr. John D. McKee.

Q. Was anyone else present that you remember?

A. No.

Q. When you refer to the bank you mean the Mercantile Trust Company of San Francisco, do you not? A. Yes.

(Deposition of J. Homer Fritch.)

Q. On California Street? A. Yes. [85—43]

Q. And you were in the directors' room of that bank? A. Yes.

Q. And Mr. McKee was present? A. Yes.

Q. And Mr. Lembkey was present? A. Yes.

Q. Did you have the original charter with you at that time, the charter which is referred to in the agreed statement of facts?

A. No, I don't think so.

Q. Who had it at that time?

A. Well, Mr. Lembkey had it. We had three copies, you know—we had three or four copies.

Q. I hand you this document and ask you if that is one of the original copies of the charter. A. Yes.

Q. That is one of the original copies?

A. Yes, that is one of the original copies.

Q. I will ask you to look on page 8 of that original and identify if you can Mr. Lembkey's signature at the bottom of the page.

A. Yes, that is Mr. Lembkey's signature.

Q. Are you familiar with Mr. Lembkey's handwriting? A. Yes.

Q. And that is his signature?

A. That is his signature.

Mr. CASSELL.—I will offer that original copy of the charter-party in evidence and offer only the 8th page of it, it being stipulated that the rest is identical with the copy referred to in the agreed statement of facts.

(Deposition of J. Homer Fritch.)

[Exhibit—Page 8 of Charter-Party.]

“—8—”

J. HOMER FRITCH

(Incorporated) (Seal)

J. M. LITCHFIELD, Witness to J. HOMER FRITCH, Prest.
the signature of Agents.

.....,

.....,

Dated at19..

[86—44]

Subject to approval of Dept.
of Com. & Labor:—

J. M. LITCHFIELD, Witness
the signature of a copy of the
original Charter-party.

W. I. LEMBKEY,
Agent Seal Fisheries.

According to telegram of September 12th received from Mr. Chas. Earl, Acting Secretary, Department of Commerce & Labor, this Charter is hereby extended for a period of 30 days from September 13th, 1911.

Subject to approval of Dept. of Commerce & Labor:

W. I. LEMBKEY,
Agent Seal Fisheries.

Q. I will ask you to look at page 8 of the original copy of the charter-party which is now in your hand, and particularly at the endorsement at the bottom of that page referring to the extension of the charter-party. I will ask you if you recall that endorsement being written upon that copy of the charter-party at that meeting in the Mercantile Trust Company.

A. I think that we adjourned to my office and wrote it; I think so; I won't be positive.

(Deposition of J. Homer Fritch.)

Q. Can you state that you either returned to your office and it was written on there in your office or that it was written at the Mercantile Trust Company?

A. Yes, it was one way or the other, but I believe it was in my office. [87—45]

Q. Did you see Mr. Lembkey sign his name to it?

A. Yes.

Q. Was there any discussion about it between you and Mr. Lembkey?

A. No: it was Mr. Lembkey's own suggestion.

Q. Did Lembkey say to you whether or not he believed that the charter had been extended by the Government?

Mr. THOMAS.—Object to the question on the ground that Lembkey's statement would not be binding on the Government in any event.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as plaintiffs' Exception No. 13.

Mr. CASSELL.—Q. Did Lembkey suggest that you communicate with the Government by wire?

A. In reference to what?

Q. In reference to the extension of the charter as suggested in the telegram of the 12th of September?

A. Yes. He not only suggested that we communicate with the Government—

Q. Let me ask you the question: Who prepared that telegram that was sent to the Department?

A. He did.

(Deposition of J. Homer Fritch.)

Q. He simply drew the phraseology of it?

A. Yes. [88—46]

Q. After the receipt of that telegram from the Government and after that endorsement had been put upon the charter which you have spoken of, what did you do with the steamer "Homer"?

A. Put her over in Oakland Creek and let her lay there, laid her up.

Q. Did Mr. Lembkey know that it was over there?

A. Yes.

Q. Did you tell Mr. Lembkey that it was over there? A. Yes.

Q. Did Mr. Lembkey go aboard?

A. I think he did, yes.

Q. How long after that was it that Mr. Lembkey went away, do you remember? A. No.

Q. How long did the "Homer" remain over there at the Oakland Creek?

A. Well, she remained the whole of that month anyhow, and how much longer I could not say now.

Q. Do you remember receiving a telegram from the Department of Commerce and Labor at any time in which they stated they would not be in a position to purchase the "Homer"? A. No.

Q. Well, you remember that the Government did not purchase the "Homer"? A. No, they did not.

Q. When did the Department tell you for the first time?

A. I don't know. Ain't that among those papers?

Q. There is a telegram referred to in the agreed

(Deposition of J. Homer Fritch.)

statement of facts in this case dated October 12th, 1911, addressed to J. Homer Fritch, Inc., signed by I. H. Dunlap, Acting Commissioner, which says, "Replying to yours October 10th Bureau of [89--47] Fisheries is not in position to purchase "Homer." That telegram is dated October 12th, 1910, just one month after the former telegram which we have referred to. Now, do you recall receiving such a telegram from the Government? Look at it; do you recall that telegram? A. Yes.

Q. That was one month, that was October 12th?

A. Yes.

Q. Now, did the Department of Commerce and Labor or any official of that Department or any one at all advise you at any time prior to October 12th, 1911, that the Department took the position that the charter had not been extended; did any one tell you prior to that date that the charter had not been extended; did the Government wire you to that effect?

A. I don't seem to remember it; is there anything in any of the telegrams?

Q. There is this telegram, Mr. Fritch, of October 12th, 1911. A. October 12th.

Q. This is the one I showed you (handing).

A. Oh, I see. No.

Q. Were there any telegrams received by you from the Department of Commerce and Labor or from any official of the Department of Commerce and Labor in which they said, "We do not consider that the charter has been extended," or "We won't exercise the option to purchase the 'Homer'?"

(Deposition of J. Homer Fritch.)

A. Not that I know of, unless they are in that file.

Q. You have no recollection of receiving any such telegram? A. No, I have not. [90—48]

Q. Did anyone tell you after that telegram which you sent on the 14th, at any time prior to this October 12th telegram, that the charter had not been extended? A. I don't know.

Q. You don't remember, anyway?

A. I don't remember, no. I don't remember when the charter was thrown up, or when they notified me that it would not be accepted.

Q. You received no telegrams from the Department concerning that matter which are not in either the agreed statement of facts in this case or in that file which you have offered in evidence?

A. I don't think so. I think you have got everything in that file—that is, you had all the papers that I had.

Q. And if you had received a telegram from the Government between the 12th day of September, 1911, and the 12th day of October, 1911, it would be in that file?

A. It would be in that file, yes.

Q. Do you remember whether during the month of September, 1911, you received any offer from any one other than the Government to purchase the steamer "Homer"?

Mr. THOMAS.—We object to that question as incompetent, irrelevant and immaterial.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plain-

(Deposition of J. Homer Fritch.)

tiffs now assign said exception to said ruling as Plaintiffs' Exception No. 14. [91—49]

Mr. CASSELL.—Q. Were negotiations pending during the month of September with other parties than the Department of Commerce and Labor in which you were looking towards the sale of the Steamer "Homer" to such parties in the event that the Government did not exercise its options?

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 15.

Mr. CASSELL.—Q. Did those negotiations subsequently go through when the Government failed to exercise its option?

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 16.

Cross-examination.

Mr. THOMAS.—Q. Mr. Fritch, were your relations with Mr. Lembkey friendly or otherwise?

A. Friendly—business relations. We had our relations every year, he representing the Government and me representing the owners of the ship. It was all business, right straight through, but still he was always friendly. [92—50]

Q. What were the circumstances of his drawing up that telegram you referred to that was sent either

(Deposition of J. Homer Fritch.)

from the bank or from your office?

A. We had talked the whole matter over in the bank and he said, "Yes"—he says, "That looks as if we had better—that is—well, that it should go ahead"; and he says, "I think you had better telegraph to them and tell them to extend it."

Q. Who sent that telegram?

A. I sent the telegram.

Q. Who wrote it? A. Mr. Lembkey wrote it.

Redirect Examination.

Mr. CASSELL.—Q. Mr. Fritch, after you received that telegram of September 12th from the Department and after Mr. Lembkey endorsed that extension on the copy of the charter-party to which we referred, and after you sent the telegram on the 14th, did you or did you not suppose that the charter-party had been extended for another month?

Mr. THOMAS.—I object to that question on the ground it calls for the conclusion of the witness.

The Court thereupon sustained respondents' said objection, to which plaintiff excepted, and plaintiffs now assign said exception to said ruling as plaintiffs' Exception No. 17. [93—51]

Mr. CASSELL.—Q. I am asking you for your belief. In putting the "Homer" out at the Oakland Creek, did you or did you not suppose that the charter had been extended and that it was there for the use of the Government?

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plain-

(Deposition of J. Homer Fritch.)

tiffs now assign said exception to said ruling as Plaintiffs' Exception No. 18.

Plaintiffs rest.

Mr. THOMAS.—If your Honor please, I desire to offer in evidence a copy of an original appointment dated May 10, 1910, of Walter I. Lembkey as Agent of the Seal Fisheries in Alaska, together with an inclosure which is attached to it. There are only two pages of the inclosure I desire to offer in evidence, the first page reading as follows:

“W. I. LEMBKEY, Agent in charge Seal Fisheries, Washington, D. C.

First. Order to proceed to Islands. You are directed to leave Washington at a date to be determined hereafter and to proceed to the Pacific Coast; there you will purchase at reasonable prices after first securing competition, bids whenever practical, such merchandise as will be required in the Pribylof Islands for the natives and others. Preliminary arrangements have been made by this Bureau for chartering the steamer ‘Homer’ to transport these supplies to the islands [94—52] and to bring the sealskins from the islands in the fall. You are directed to complete the arrangements for such chartering and to sign such charter for the Government subject to the approval of the Department of Commerce and Labor.”

Then turning to paragraph 37 of the inclosure:

“Conclusion: Should questions arise involving matters not covered by these instructions it will be your duty to report the facts to the Department and

(Deposition of J. Homer Fritch.)

to await instructions except in cases requiring immediate decision, when you will take such action as sound judgment dictates.”

This is certified by William Redfield, Secretary of Commerce.

Mr. CASSELL.—I object to this document upon the ground that Mr. Lembkey occupied a position the authority under which he held being defined by the statutes of the United States, to wit, the particular statute provides for the appointment of an agent for the Seal Fisheries for the Department of the Interior; 1 Fed. Stats. Annotated, 429. On the further ground that Mr. Lembkey was held out in the Department as its agent and as authorized to consummate the transactions that are involved here; upon the further ground that no notice of any limitations which may appear upon his authority in this document was ever brought to the notice of the plaintiffs. [95—53]

The COURT.—In dealing with Government agents you do not need to bring to the attention of the parties dealing with them the limitations of their powers; they are circumscribed by the law and everybody is presumed to know the law. It is not like dealing with a private agency at all.

Mr. CASSELL.—We contend that the law actually did define his authority. He was simply appointed as agent of the Seals Fisheries. There is one further ground of objection—there is nothing in this document that in any way limits Lembkey’s authority so as to prevent him from taking part in the transactions.

(Deposition of J. Homer Fritch.)

The COURT.—That ground would be in your favor.

The Court thereupon overruled plaintiffs' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 19.

The cause was thereupon argued by counsel for the respective parties, and therupon the following proceedings were had:

The COURT.—I do not think, Mr. Cassell, that the Court would be justified in rendering a judgment against the Government on such uncertain evidence. There is room, however, for a different view, perhaps, but it should be taken by an Appellate Court. I think that, sitting as a court of first instance, I would not be justified in granting the relief asked in your second cause of action. You may have full [96—54] findings and if the Circuit Court of Appeals takes a different view it would simply result in judgment going your way for the balance. Judgment can go under the first cause of action for the amount due thereunder.

Mr. CASSELL.—And with interest, your Honor?

The COURT.—I suppose they are entitled to interest, aren't they?

Mr. THOMAS.—I think they are, if the Court please.

Mr. CASSELL.—I request the Court to find these facts: That for several years prior to the year 1911, the Department of Commerce and Labor had chartered from the plaintiffs the steamship "Homer"

(Deposition of J. Homer Fritch.)

for a period of from three to four months during the summer of each year; that the time of year during which the said "Homer" had been chartered by said Department during said years was usually the months of June, July, August, and a portion of the month of September.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception No. 20.

Mr. CASSELL.—I request the Court to find as follows:

That the said "Homer" was used by said Department in connection with the carrying on of the Alaska Seal Fisheries, and particularly for the purpose of carrying supplies to the Pribilof Islands and of returning with a cargo of skins. [97—55]

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception No. 21.

Mr. CASSELL.—I request the Court to find as follows:

That said steamship "Homer" was peculiarly adapted to the said purposes of the Department in connection with the said work of said Alaska Seal Fisheries.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said ex-

(Deposition of J. Homer Fritch.)

ception to said ruling as Plaintiffs' Exception No. 22.

Mr. CASSELL.—I request the Court to find as follows:

That for some time prior to the year 1911, said Department of Commerce and Labor had been desirous of purchasing said steamship "Homer" for the use of said Alaska Seal Fisheries.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Excetion No. 23.

Mr. CASSELL.—I request the Court to find as follows:

That the adaptability of said steamship "Homer" for the purposes of said Department in connection with said Alaska Seal Fisheries was recognized by W. I. Lembkey, the agent of said Department of Commerce and Labor for the said Alaska Seal Fisheries, and by George M. Bowers, the Commissioner of Fisheries, of the Department of Commerce and Labor, and it was desired by said Bowers and said Lembkey that said "Homer" should be purchased by the said Department for the use of said Alaska Seal [98—56] Fisheries, as aforesaid.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception No. 24.

Mr. CASSELL.—I request the Court to find as follows:

(Deposition of J. Homer Fritch.)

That during the fall of 1910 and the spring of 1911, negotiations were pending between said Department of Commerce and Labor and the plaintiffs, looking towards the purchase of said steamship "Homer" by said Department from said plaintiffs.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling of Plaintiff's Exception No. 25.

Mr. CASSELL.—I request the Court to find as follows:

That prior to the 24th day of April, 1911, and the entering into of the charter-party referred to in the agreed statement of facts herein, the said Commissioner and the said Lembkey advised plaintiffs that the said Department desired to purchase said "Homer," but did not then have on hand and would not have on hand during the summer of 1911 a fund sufficient to purchase said "Homer" outright; that at said last-mentioned time, said Commissioner and said Lembkey further advised said plaintiffs that the said Department had and would have on hand a fund of \$20,000, which was and would be available for the purchase of said steamship "Homer," and that the said Department had on hand a further sum which, though not available for the purchase of said "Homer," would be available for the chartering thereof. [99—57]

The Court thereupon denied said request and re-

(Deposition of J. Homer Fritch.)

fused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception No. 26.

Mr. CASSELL.—I request the Court to find as follows:

That at said last-mentioned time, said Commissioner and said Lembkey further advised said plaintiffs that, if said Department were to charter the "Homer" for the customary period during the summer of 1911, it would be on the understanding that the charter money so paid should apply on the purchase price of the "Homer," and further advised plaintiffs that the charter might then be prolonged by laying the "Homer" up in the Oakland Creek, or by some other arrangement, until the charter money should reach an amount equal to the balance of the purchase price.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception No. 27.

Mr. CASSELL.—I request the Court to find as follows:

That section 21 of the charter-party of April 24, 1911, was inserted at the request of the Department of Commerce and Labor, and that prior to the date of the charter-party plaintiffs were advised by said Bowers and said Lembkey that, if Section 21 were inserted, the Department might desire to extend the

(Deposition of J. Homer Fritch.)

charter beyond the time when the "Homer" should return from Alaska, for the purpose of enabling the Department to pay such a further amount on the charter hire of the vessel as would, when added to the amount previously paid thereon bring the total to within \$20,000 of the purchase price of the "Homer." [100—58]

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception No. 28.

Mr. CASSELL.—I request the Court to find as follows:

That upon receipt of this telegram of September 12, 1911, and prior to noon of that day, the plaintiffs exhibited the telegram to W. I. Lembkey, and Lembkey stated to them that, in his belief, it was the intention of the said Department to extend the charter-party for a further period of thirty days, and that the said Lembkey thereupon endorsed upon the charter-party the extension which appears at the end thereof.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception No. 29.

Mr. CASSELL.—I request the Court to find as follows:

That the said Lembkey drafted the telegram of

(Deposition of J. Homer Fritch.)

September, 1911, hereinbefore set forth and advised plaintiffs that it be sent to the Department.

The Court thereupon denied said request and refused to make said findings, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception 30.

Mr. CASSELL.—I request the Court to find as follows:

That at or about noon of the 12th day of September, 1911, and after the receipt of the telegram of September 12, 1911, the said "Homer" was placed in the Oakland Creek by plaintiffs and there remained until subsequent to the 13th day of October, 1911, and the said Lembkey was fully advised [101—59] of the fact that the said "Homer" had been placed in Oakland Creek as aforesaid, and that said "Homer" was to remain there as aforesaid.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception No. 31.

Mr. CASSELL.—I request the Court to find as follows:

That it was the intention of all of the parties by the telegram of September 12, 1911, in view of all of the circumstances, to extend or offer to extend the charter-party of April 24th for a further period of thirty days.

The Court thereupon denied said request and re-

(Deposition of J. Homer Fritch.)

fused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception No. 32.

Mr. CASSELL.—I request the Court to find as follows:

That the meaning of the word "otherwise" used in the telegram of September 12, 1911, from the Department of Commerce and Labor to plaintiffs was, in view of all of the circumstances "in any other event," and not "in other respects." That is to say, the Department of Commerce and Labor, by said telegram meant that the said charter-party of April 24, 1911, should be terminated in the event that the option mentioned in Section 21 thereof was not extended, but that, if said option was extended, the charter was likewise to be extended for a further period of thirty days.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as [102—60] Plaintiffs' Exception No. 33.

Mr. CASSELL.—I request the Court to find as follows:

That the Department of Commerce and Labor duly received the telegram of September 14, 1911, and the telegram of October 10, 1911, set forth in the agreed statement of facts, and that, notwithstanding, the said Department did not advise the plaintiffs or any of them in any way that it had not

(Deposition of J. Homer Fritch.)

intended to extend said charter-party until after the 25th day of October, 1911.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception No. 34.

Mr. CASSELL.—I request the Court to find as follows:

To find in favor of the plaintiffs upon the second count upon the ground that there is no substantial evidence to support a judgment in favor of the defendant upon the said second count.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception No. 35.

The Court thereupon proceeded to make its findings and, among other things, found as follows:

“That the steamship ‘Homer’ was fully discharged of her cargo and turned over to the owners by the charterer on or prior to the 12th day of September, 1911, at the port of San Francisco, California.” [103—61]

To the making of this “finding” plaintiffs duly objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled plaintiffs said objection, to which ruling plaintiffs duly excepted, and now assign said exception as Plaintiffs' Exception No. 36.

The Court also found, among other things, as follows:

“That W. I. Lembkey did not have authority to extend the charter-party beyond the 12th day of September, 1911, and his attempted extension thereof was not ratified or approved by the Department of Commerce and Labor, or by any Department or Agent of the defendant.”

Counsel for plaintiffs duly objected to the making of this finding upon the ground that there was no substantial evidence before the Court to support it.

The Court overruled said objection, to which ruling plaintiffs duly excepted, and plaintiffs now assign said exception as Plaintiffs' Exception No. 37.

The Court also found as follows:

“That there was no contract or agreement between the plaintiffs and the defendant extending the charter-party beyond September 12, 1911.”

Counsel for plaintiffs duly objected to the making of this finding upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled said objection, to which ruling plaintiffs duly excepted, and now assign said exception as Plaintiffs' Exception No. 38.
[104—62]

The foregoing constitutes all of the proceedings and all of the testimony offered and received on the trial of said action, and now, within the time required by law and the rules of this Court, said plaintiffs propose the foregoing as and for their bill of exceptions to the rulings of the Court made during

the trial of the above-entitled action, and to the decision of said Court, and pray that it may be settled and allowed as correct.

DATED San Francisco, California, November, 11th, 1915.

IRA A. CAMPBELL,
Attorney for Plaintiff.

Stipulation as to the Correctness of Bill of Exceptions.

IT IS HEREBY STIPULATED that the above and foregoing constitutes a true and correct bill of exceptions in the above-entitled action, and that the same contains all of the proceedings had, and all of the testimony offered and received on the trial of the said action, and all of the rulings of the Court made during the trial of said action, and that the same may be settled and allowed as and for the bill of exceptions to such rulings and to the decision of the Court herein.

Dated San Francisco, California, November 11th, 1915.

IRA A. CAMPBELL,
Attorney for Plaintiffs and Petitioners,
JNO. W. PRESTON,
U. S. Attorney.

M. A. THOMAS,
Assistant U. S. Attorney.

Attorneys for Respondent [105—63]

Order Settling, Certifying and Allowing Bill of Exceptions.

The foregoing bill of exceptions now being presented in due time and as amended by the Court and found to be correct, I do hereby certify that the said bill is a true bill of exceptions and contains all of the proceedings had and all of the testimony offered and received on the trial of the said action, and all of the rulings of the Court made during said trial, and all of the exceptions of the respective parties thereto.

Dated November 15th, 1915.

WM. C. VAN FLEET,
United States District Judge, Northern District of
California.

[Endorsed]: Filed Nov. 15, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [106—64]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Cor-
poration, E. T. KRUSE, MARY BELL
PARKER BURNS, CECILIA SUDDEN,
JAMES HOGG, JAMES P. TAYLOR and
KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondent.

Stipulation and Order Extending Time to File Findings, etc.

It is hereby stipulated and agreed by and between the respective parties hereto that the plaintiffs above named may have to and including the 12th day of July, 1915, within which to prepare a draft of findings and to deliver the same to the clerk of the above-entitled court for the Judge thereof, and to serve a copy thereof upon the above-named respondent pursuant to Rule 63 of the Rules of the above-entitled court, and that the said respondent shall have five (5) days thereafter within which to deliver to the clerk of said court, to serve upon said plaintiffs such proposed amendments or additions to such findings as it may desire.

IT IS FURTHER STIPULATED AND AGREED that said findings shall thereafter be settled by the Judge of said court and thereafter engrossed by said respondent as provided by said Rule 63.

IT IS FURTHER STIPULATED AND AGREED by and between the parties hereto that no judgment shall be entered in said cause [107] until the said findings shall have been signed and filed as aforesaid, and that plaintiffs' attorney may have to and including twenty (20) days after written notice of the entry of judgment in said action within which to prepare, serve and file its proposed bill of exceptions for use upon the appeal, or writ of error from the said judgment.

108 *J. Homer Fritch, Incorporated, et al.*

Dated July 9th, 1915.

IRA A. CAMPBELL,
Attorney for Plaintiffs.
JOHN W. PRESTON,
United States Attorney.

Good cause appearing therefor, and upon the foregoing stipulation, IT IS SO ORDERED this 9th day of July, 1915.

WM. H. SAWTELLE,
United States District Judge.

[Endorsed]: Filed Jul. 9, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [108]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a corporation, E. T. KRUSE, MARY BELL PARKER BURNS, CECILIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondent.

Stipulation and Order Extending Time to File Findings, etc.

It is hereby stipulated and agreed by and between the respective parties hereto that the plaintiffs above named may have to and including the first day of

August, 1915, within which to prepare a draft of findings and to deliver the same to the clerk of the above-entitled court for the Judge thereof, and to serve a copy thereof upon the above-named respondent pursuant to Rule 63 of the Rules of the above-entitled Court, and that the said respondent shall have five (5) days thereafter within which to deliver to the clerk of said court, to serve upon said plaintiffs, such proposed amendments or additions to such findings as it may desire.

It is further stipulated and agreed that said findings shall thereafter be settled by the Judge of said court and thereafter engrossed by said respondent as provided by said [109] Rule 63.

It is further stipulated and agreed by and between the parties hereto that no judgment shall be entered in said cause until the said findings shall have been signed and filed as aforesaid, and that plaintiffs' attorney may have to and including twenty (20) days after written notice of the entry of judgment in said action within which to prepare, serve and file its proposed bill of exceptions for use upon the appeal, or writ of error from the said judgment.

Dated July 12, 1915.

IRA A. CAMPBELL,
Attorney for Plaintiffs.

JOHN W. PRESTON,
United States Attorney.

Good cause appearing therefor, and upon the foregoing stipulation, IT IS SO ORDERED this 13th day of July, 1915.

WM. C. VAN FLEET,
United States District Judge.

110 *J. Homer Fritch, Incorporated, et al.*

[Endorsed]: Filed Jul. 14, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [110]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Cor-
poration, E. T. KRUSE, MARY BELL
PARKER BURNS, CECILIA SUDDEN,
JAMES HOGG, JAMES P. TAYLOR and
KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondent.

**Stipulation and Order Extending Time to File Find-
ings, etc.**

IT IS HEREBY STIPULATED AND AGREED
by and between the respective parties hereto that the
plaintiffs above named may have to and including
the 14th day of August, 1915, within which to pre-
pare a draft of findings and to deliver the same to
the clerk of the above-entitled court for the Judge
thereof, and to serve a copy thereof upon the above-
named respondent pursuant to Rule 63 of the Rules
of the above-entitled court, and that the said re-
spondent shall have five (5) days thereafter within
which to deliver to the clerk of said court, to serve
upon said plaintiffs, such proposed amendments or
additions to such findings as it may desire.

IT IS FURTHER STIPULATED AND AGREED that said findings shall thereafter be settled by the Judge of said court and thereafter engrossed by said respondent as provided by said Rule 63.

IT IS FURTHER STIPULATED AND AGREED by and between the parties hereto that no judgment shall be entered in said cause [111] until the said findings shall have been signed and filed as aforesaid, and that plaintiffs' attorney may have to and including twenty (20) days after written notice of the entry of judgment in said action within which to prepare, serve and file its proposed bill of exceptions for use upon the appeal, or writ of error from the said judgment.

Dated July 17, 1915.

IRA A. CAMPBELL,
Attorney for Plaintiffs.
JNO. W. PRESTON,
United States Attorney.

Good cause appearing therefor, and upon the foregoing stipulation, IT IS SO ORDERED, this 17th day of July, 1915.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed Jul. 19, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [112]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Cor-
poration, E. T. KRUSE, MARY BELL
PARKER BURNS, CECILIA SUDDEN,
JAMES HOGG, JAMES P. TAYLOR and
KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondent.

**Stipulation and Order Extending Time to File Find-
ings, etc.**

IT IS HEREBY STIPULATED AND AGREED
by and between the respective parties hereto that the
plaintiffs above named may have to and including
the 14th day of September, 1915, within which to
prepare a draft of findings and to deliver the same
to the clerk of the above-entitled court for the Judge
thereof, and to serve a copy thereof upon the above-
named respondent, pursuant to Rule 63 of the Rules
of the above-entitled court, and that the said re-
spondent shall have five (5) days thereafter within
which to deliver to the clerk of said court, to serve
upon said plaintiffs, such proposed amendments or
additions to such findings as it may desire.

IT IS FURTHER STIPULATED AND
AGREED that said findings shall thereafter be set-
tled by the Judge of said court and thereafter en-

grossed by said respondent as provided by said Rule 63.

IT IS FURTHER STIPULATED AND AGREED by and between the parties hereto that no judgment shall be entered in said cause until the said findings shall have been signed and filed, as [113] aforesaid, and that plaintiffs' attorney may have to and including twenty (20) days after written notice of the entry of judgment in said action within which to prepare, serve and file its proposed bill of exceptions for use upon the appeal, or writ of error from the said judgment.

Dated Aug. 11th, 1915.

IRA A. CAMPBELL,
Attorney for Plaintiffs.

JNO. W. PRESTON,
United States Attorney.

Good cause appearing therefor, and upon the foregoing stipulation, IT IS SO ORDERED.

M. T. DOOLING,
United States District Judge.

Dated Aug. 11th, 1915.

[Endorsed]: Filed Aug. 11, 1915. Walter B. Maling, Clerk. [114]

*In the District Court of the United States in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Cor-
poration, E. T. KRUSE, MARY BELL
PARKER BURNS, CECILIA SUDDEN,
JAMES HOGG, JAMES P. TAYLOR and
KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondent.

**Stipulation and Order Extending Time to File Find-
ings, etc.**

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiffs above named may have to and including the 14th day of November, 1915, within which to prepare a draft of findings and to deliver the same to the clerk of the above-entitled court for the judge thereof, and to serve a copy thereof upon the above-named respondent, pursuant to Rule 63 of the Rules of the above-entitled court, and that the said respondent shall have five days thereafter within which to deliver to the clerk of said court, to serve upon said plaintiffs, such proposed amendments or additions to such findings as it may desire.

IT IS FURTHER STIPULATED AND AGREED that said findings shall thereafter be settled by the Judge of said court and thereafter en-

grossed by said respondent as provided by [115]
said Rule 63.

IT IS FURTHER STIPULATED AND
AGREED by and between the parties hereto that no
judgment shall be entered in said cause until the
said findings shall have been signed and filed, as
aforesaid, and that plaintiffs' attorney may have to
and including twenty days after written notice of
the entry of judgment in said action within which
to prepare, serve and file its proposed bill of excep-
tions for use upon the appeal, or writ of error from
the said judgment.

Dated October 11th, 1915.

IRA A. CAMPBELL,
Attorney for Plaintiffs.
JNO. W. PRETSON,
United States Attorney.

Good cause appearing therefor, and upon the fore-
going stipulation, IT IS SO ORDERED.

WM. C. VAN FLEET,
United States District Judge.

Dated October 13, 1915.

[Endorsed]: Filed Oct. 13, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [116]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Cor-
poration, E. T. KRUSE, MARY BELL
PARKER BURNS, CECILIA SUDDEN,
JAMES HOGG, JAMES P. TAYLOR and
KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondent.

Petition for Writ of Error.

J. Homer Fritch, Incorporated, a corporation, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers, Petitioners and Plaintiffs in the above-entitled action, feeling themselves aggrieved by the decision of the Court denying them relief, and holding that they take nothing by reason of the second count in their complaint and petition contained, and by that portion of the judgment of the Court entered herein on the 5th day of Nov., 1915, wherein it was ordered, adjudged and decreed that said plaintiffs and petitioners take nothing by their said second count so contained in their said petition and complaint, come now by Ira A. Campbell, Esquire, their attorney, and petition said Court for an order allowing said petitioners and plaintiffs to prosecute a writ of error to the Honorable, the United States

Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the [117] United States in that behalf made and provided, and also that an order be made fixing the amount of security which the plaintiffs and petitioners shall furnish upon said writ of error.

And your petitioners will ever pray.

November 15th, 1915.

IRA A. CAMPBELL,
Attorney for said Petitioners and Plaintiffs.

[Endorsed]: Filed Nov. 15, 1915. W. B. Mañing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[118]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No 15,599.

J. HOMER FRITCH, INCORPORATED, a Corporation, E. T. KRUSE, MARY BELL PARKER BURNS, CECILIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondent.

Assignment of Errors.

Come now J. Homer Fritch, Incorporated, a corporation, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P. Taylor and

Kate E. Spiers, petitioners and plaintiffs herein, and make and file the following assignment of errors, upon which they will rely in the prosecution of their writ of error in the above-entitled cause:

1.

The above-entitled Court erred in holding and determining that respondent was entitled to judgment that said plaintiffs take nothing on the second count of their complaint herein.

2.

The Court erred in holding and determining that the charter of the steamer "Homer," dated April 24, 1911, was not extended by the respective parties thereto for a further period of thirty (30) days from and after the 13th day of September, 1911.

[119]

3.

The Court erred in holding and determining that respondent did not become liable to the plaintiffs for the charter hire of the steamer "Homer" for a period of thirty (30) days from and after the 13th day of September, 1911.

4.

The Court erred in holding and determining that by its telegram, dated September 12, 1911, to J. Homer Fritch, Incorporated, the Department of Commerce and Labor did not offer to extend the charter of said steamer "Homer," dated April 24, 1911, for a further period of thirty (30) days.

5.

The Court erred in holding and determining that there was no meeting of minds between plaintiffs

and the said Department of Commerce and Labor with regard to the extension of the charter-party of April 24, 1911, or the option beyond September 12, 1911.

6.

The Court erred in holding and determining that the language of the telegram of September 12, 1911, from the Department of Commerce and Labor to the plaintiffs, taken in connection with the charter-party and paragraph twenty-one (21) thereof and all the evidence introduced on behalf of the parties thereto, shows that the intention of the Department of Commerce and Labor was to secure an extension of the option to purchase merely, and was not to extend or offer to extend the said charter-party for a period of thirty (30) days, or any other period. [120]

7.

The Court erred in holding and determining that notwithstanding any previous correspondence between the Department of Commerce and Labor and the plaintiffs with regard to the purchase of the steamer "Homer," there was no extension of the charter-party beyond the 12th day of September, 1911.

8.

The Court erred in refusing to hold upon the undisputed evidence that it was the intention of the Department of Commerce and Labor in sending said telegram of September 12, 1911, to offer to extend said charter-party of April 24, 1911, for a further period of thirty (30) days.

9.

The Court erred in holding and determining that the Department of Commerce and Labor was not estopped from asserting that it had not intended, by said telegram of September 12, 1911, to offer to extend said charter-party of April 24, 1911, for a further period of thirty (30) days.

10.

The Court erred in refusing to hold that the necessary meaning of said telegram of September 12, 1911, by reason of the language implied therein, was that said Department of Commerce and Labor intended thereby to offer to extend said charter-party of April 24, 1911, for a further period of thirty (30) days.

11.

The Court erred in refusing to hold and determine that the necessary meaning of said telegram of September 12, 1911, by reason of the terms and expressions used therein and by [121] reason of the circumstances under which said telegram was sent, and disclosed by the prior transactions between the parties, and their prior correspondence, as disclosed by the undisputed evidence, was that said Department of Commerce and Labor intended by said telegram to offer to extend said charter-party of April 24, 1911, for a further period of thirty (30) days.

12.

The Court erred in holding and determining that the extension of said charter-party for a further period of thirty (30) days by W. I. Lembkey was never in fact approved by the Department of Commerce and Labor.

13.

The Court erred in holding and determining that said Department of Commerce and Labor was not bound by the statements of said Lembkey, which the undisputed evidence shows were made by said Lembkey to plaintiffs at the time of said alleged extension of said charter party, to the effect that he believed the Department intended to offer to extend said charter-party for a further period of thirty (30) days by said telegram of September 12, 1911.

14.

The Court erred in not holding and determining that the said Department of Commerce and Labor was not bound in any respect by the knowledge or statements or actions of said Lembkey with respect to the extension of said charter-party.

15.

The Court erred in sustaining respondent's objection to a question propounded to the witness, John D. McKee, [122] covered by Plaintiffs' Exception No. 1, as follows:

"Q. Did Mr. Lembkey state, in your presence and in the presence of Mr. Fritch at that time, what he believed the reason of the Government to be for wanting the charter extended a period of 30 days? A. Yes, sir.

Q. State what that was.

Mr. THOMAS.—I object to that, if your Honor please; it is not shown that any statement Mr. Lembkey would make would be binding upon the Government in this matter.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 1."

16.

The Court erred in sustaining respondent's objection to a question propounded to the witness, John D. McKee, covered by Plaintiff's Exception No. 2, as follows:

"Mr. CASSELL.—Q. Will you state what was said by Mr. Lembkey at the time with regard to the purpose of the Department in desiring to extend the charter-party for 30 days.

Mr. THOMAS.—We object to that, if your Honor please, upon the ground that the charter-party shows upon its face that anything Lembkey did was subject to the approval of the Department, and that Lembkey's private conversations with these gentlemen [123] or his statements to them are in no way binding upon the Government.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiff's Exception No. 2."

17.

The Court erred in sustaining respondent's objection to a question propounded to the witness, John D. McKee, covered by Plaintiff's Exception No. 3, as follows:

"Mr. CASSELL.—Q. Will you state what was the nature of the negotiations you then had

pending for the sale of the 'Homer' to other parties in the event that the sale to the Government did not go through in accordance with the terms of the provisions of clause 21 of the charter-party.

Mr. THOMAS.—We object to the question, if your Honor please, upon the ground that the answer would be immaterial, irrelevant and incompetent, and it would have no bearing at all on this case.

The COURT.—He has stated that there were negotiations and that is all that is material; the specific nature of them is not material. The objection is sustained. The fact is, Mr. Cassell, I do not think it is material whether [124] he had other negotiations. He had a right to want to sell the vessel to the Government whether he had other people seeking it, or not.

Mr. CASSELL.—I do not desire to offer anything further in face of your Honor's ruling, but I want to show that the parties were acting in absolutely good faith, and that they actually did have prospects of selling the vessel.

The COURT.—You don't have to show good faith in that regard.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiff's Exception No. 3."

18.

The Court erred in sustaining respondent's objection to the offer by plaintiffs of that certain contract

dated September 15, 1911, wherein one W. S. Scammell agreed to purchase said steamer "Homer" in the event that the United States Government should not exercise its option, and, in accordance with the terms of which said agreement, said Scammell deposited one thousand (1,000) dollars as the first payment on account of the purchase price thereof, said payment to be returned in the event of the exercise by the United States Government of its said option, which said objection is more particularly shown by Plaintiffs' Exception No. 5.

19.

The Court erred in sustaining respondent's objection to a question propounded to the witness, John D. McKee, covered [125] by Plaintiffs' Exception No. 6, as follows:

"Mr. CASSELL.—Q. Was it the belief of yourself, at that meeting and at all times thereafter during the months of September and October, 1911, that that charter had been extended by those telegrams?

Mr. THOMAS.—I desire to object to that question, your Honor, upon the ground that the belief of Mr. McKee is in no wise binding upon the defendant.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 6."

20.

The Court erred in sustaining respondent's objection to a question propounded to the witness, J.

Homer Fritch, as shown by Plaintiffs' Exception No. 7, as follows:

"Q. Was that new boiler installed by you solely in the expectation of chartering the 'Homer' for the season or with the expectation of selling the 'Homer' to the Government?

A. I guess it was a little of both; I can't say that it was.

Mr. THOMAS.—I desire to object to that question and ask that the answer be stricken out on the ground that it calls for a conclusion of the witness. [126]

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 7."

21.

The Court erred in sustaining respondent's objection to a question propounded to the witness, J. Homer Fritch, as shown by Plaintiffs Exception No. 8, as follows:

"Mr. CASSELL.—Q. Mr. Fritch, would you have installed a new boiler on the 'Homer' if you had not been in the expectation of selling the 'Homer' to the Government. As its managing owner would you have expended the sum of eight thousand dollars in the installing of a new boiler in the 'Homer' if you had not been in the expectation of selling the 'Homer' to the Government?

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondent's

said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 8."

22.

The Court erred in sustaining respondent's objection to a question propounded to the witness, J. Homer Fritch, as shown by Plaintiffs' Exception No. 9, as follows:

"Q. Mr. Fritch, you will recall that clause 21 of the charter-party, which is embodied in the agreed statement of facts in this action, read as follows: [127] 'That the Charterers have the option, at any time during this Charter, of purchasing the said vessel for the sum of forty-five thousand (\$45,000.00) Dollars, against which any amount paid for the hire of the said Vessel, less cost of operation, shall be set off and deducted, but that the Purchasers shall pay interest at the rate of 6% per annum and insurance on the amount of purchase money from the date of this Charter to the completion of sale.' In other words, under the charter-party which you subsequently made with the Government, the Government had the right at any time during the charter to purchase the 'Homer' from you for \$45,000, allowing the amount in part payment of whatever the Government paid to you as hire for the summer of 1911. Will you state whether or not it was your expectation in inserting that clause in the contract that the Government would be able to pay cash for the balance due on the purchase

price of the 'Homer' at the expiration of the summer after the amount of hire had been paid for the summer months by the Government.

Mr. THOMAS.—I object to that question on the ground that it calls for the conclusion of the witness as to what his expectation was.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and [128] plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 9."

23.

The Court erred in sustaining respondent's objection to a question propounded to the witness, J. Homer Fritch, as shown by Plaintiffs' Exception No. 10, as follows:

"Mr. CASSELL.—Q. Mr. Fritch, I will ask you if in granting the Government an option to purchase the 'Homer' by this 21st clause of the charter-party, you had in mind the representation made to you in the two letters to which I have referred, namely, the letters of December 2d, 1910, and December 15th, 1910, to the effect that the Department of Commerce and Labor would have a fund sufficient to pay for the balance of the purchase price of the 'Homer' after it had paid the amount of hire for the summer months.

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 10."

24.

The Court erred in sustaining respondent's objection to a question propounded to the witness, J. Homer Fritch, as shown by Plaintiffs' Exception No. 11, as follows:

"Mr. CASSELL.—Q. Mr. Fritch, I ask you if you would have granted the Government this option to purchase [129] the 'Homer' had you not believed that the Department of Commerce and Labor had a fund sufficient to pay for the 'Homer,' as stated in these letters .

Mr. THOMAS.—I object to that question on the ground that it calls for the opinion or conclusion of the witness.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 11."

25.

The Court erred in granting the motion by respondent to strike out certain answers to questions propounded to the witness, J. Homer Fritch, as shown by Plaintiffs' Exception No. 12, as follows:

"Mr. CASSELL.—Q. Did you believe that they had a fund of \$20,000 available?

A. Yes; I am pretty sure they had it.

Q. And did you believe they had this fund of \$20,000 referred to in the letters of December 2d, 1910, and December 15th, 1910, to which I have referred? A. Yes.

Counsel for respondent thereupon moved to strike out the answers to the foregoing ques-

tions upon the same grounds as those specified in the last exception.

The Court thereupon [130] sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiff's Exception No. 12."

26.

The Court erred in sustaining respondent's objection to a question propounded to the witness, J. Homer Fritch, as shown by Plaintiffs' Exception No. 13, as follows:

"Q. Did Lembkey say to you whether or not he believed that the charter had been extended by the Government?

Mr. THOMAS.—Object to the question on the ground that Lembkey's statement would not be binding on the Government in any event.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiff's Exception No. 13''.

27.

The Court erred in sustaining respondent's objection to a question propounded to the witness, J. Homer Fritch, as shown by Plaintiffs' Exception No. 14, as follows:

"Q. Do you remember whether during the month of September, 1911, you received any offer from anyone other than the Government to purchase the Steamer 'Homer'?

Mr. THOMAS.—We object to that question

as incompetent, irrelevant and immaterial.
[131]

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 14."

28.

The Court erred in sustaining respondent's objection to a question propounded to the witness, J. Homer Fritch, as shown by Plaintiffs' Exception No. 15, as follows:

"Mr. CASSELL.—Q. Were negotiations pending during the month of September with other parties than the Department of Commerce and Labor in which you were looking towards the sale of the Steamer 'Homer' to such parties in the event that the Government did not exercise its option?

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiff's Exception No. 15."

29.

The Court erred in sustaining respondent's objection to a question propounded to the witness, J. Homer Fritch, as shown by Plaintiffs' Exception No. 16, as follows:

"Mr. CASSELL.—Q. Did those negotiations subsequently go through when the Government failed to exercise its option?

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondent's

[132] said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiff's Exception No. 16."

30.

The Court erred in sustaining respondent's objection to a question propounded to the witness, J. Homer Fritch, as shown by Plaintiffs' Exception No. 17, as follows:

"Mr. CASSELL.—Q. Mr. Fritch, after you received that telegram of September 12th from the Department and after Mr. Lembkey endorsed that extension on the copy of the charter-party to which we referred, and after you sent the telegram on the 14th, did you or did you not suppose that the charter-party had been extended for another month?

Mr. THOMAS.—I object to that question on the ground it calls for the conclusion of the witness.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 17."

31.

The Court erred in sustaining respondent's objection to a question propounded to the witness, J. Homer Fritch, as shown by Plaintiffs' Exception No. 18, as follows:

"Mr. CASSELL.—Q. I am asking you for your belief. In putting the 'Homer' out at [133] the Oakland Creek, did you or did you not suppose that the charter had been extended

and that it was there for the use of the Government?

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 18."

32.

The Court erred in overruling plaintiffs' objection to respondent's offer in evidence of a copy of an original appointment, dated May 10, 1910, of Walter I. Lembkey as Agent of the Seal Fisheries in Alaska, together with an enclosure which was attached to it, upon the ground that said Lembkey's authority was determined by the Federal Statutes, to wit, 1 Fed. Stats. Ann. 429; upon the further ground that said Lembkey was held out by the Department as its agent and as authorized to consummate transactions involved in this action; upon the further ground that no notice of any limitations of his authority was ever brought to the attention of plaintiffs; upon the further ground that upon its face the document did not show any limitation upon Lembkey's authority, so as to prevent him from binding the Department of Commerce and Labor, all of which is more particularly set forth in Plaintiffs' Exception No. 19. [134]

33.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 20.

34.

The Court erred in refusing to make a finding of

fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 21.

35.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 22.

36.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 23.

37.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 24.

38.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 25.

39.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 26.

40.

The Court erred in refusing to make a finding of [135] fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 27.

41.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 28.

42.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plain-

tiffs' Exception No. 29.

43.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 30.

44.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 31.

45.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 32.

46.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 33.

47.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 34. [136]

48.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 35.

49.

The Court erred in overruling plaintiffs' objection to the Court's making the finding referred to in Plaintiffs' Exception No. 36.

50.

The Court erred in overruling plaintiffs' objection to the making of the finding referred to in Plaintiffs' Exception No. 37.

51.

The Court erred in overruling plaintiffs' objection to the making of the finding referred to in Plaintiffs' Exception No. 38.

WHEREFORE, Plaintiffs in Error herein pray that the judgment of the above-entitled court be reversed in so far as it adjudged that plaintiffs take nothing by the second count of their said complaint.

Dated San Francisco, California, November 15th, 1915.

IRA A. CAMPBELL,
Attorney for said Plaintiffs in Error.

[Endorsed]: Filed Nov. 15, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [137]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Corporation, E. T. KRUSE, MARY BELL PARKER BURNS, CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Respondent.

Order Allowing Writ of Error.

Upon motion of Ira A. Campbell, Esquire, attor-

ney for the above-named petitioners and plaintiffs, and upon filing a petition for a writ of error,

IT IS ORDERED that a writ of error be, and it is hereby, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit that portion of the judgment heretofore entered herein wherein it is ordered, adjudged and decreed that plaintiffs take nothing by the second count contained in the petition on file herein, and that the amount of bond on said writ of error be and the same is hereby fixed at two hundred fifty (250) dollars.

Dated November 15th, 1915.

WM. C. VAN FLEET,
Judge of Said Court.

[Endorsed]: Filed Nov. 15, 1915, W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[138]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Corporation, E. T. KRUSE, MARY BELL PARKER BURNS, CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Respondent.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That the undersigned, Massachusetts Bonding and Insurance Company, a corporation, created, organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts, and duly authorized to transact business in the State of California, and fully qualified before the department of justice to execute bonds and undertakings in any and all Federal courts of the United States of America, is held and firmly bound unto the defendant and respondent herein, United States of America, in the full and just sum of two hundred and fifty (250) dollars to be paid to said defendant and respondent, to which payment well and truly to be made the undersigned binds itself and its successors by these presents.

SEALED with our seals and dated this 15th day, of November, 1915. [139]

WHEREAS, J. Homer Fritch, Incorporated, a corporation, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers, the above-named petitioners and plaintiffs, have sued out a writ of error in the United States Circuit Court of Appeals in and for the Ninth Circuit to reverse that portion of the judgment entered in the above-entitled action wherein it is ordered, adjudged and decreed that said petitioners and plaintiffs take nothing by the second count contained in the petition or complaint on file in said action.

NOW, THEREFORE, the condition of this obligation is such that if said plaintiffs and petitioners shall prosecute such a writ of error to effect, and answer all damages and costs if they shall fail to make good said plea, then this obligation shall be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, the Massachusetts Bonding and Insurance Company, a corporation, has hereunto caused its corporate name to be signed and attested, and its corporate seal to be affixed by its duly authorized officers at San Francisco, California, this 15th day of November, 1915.

MASSACHUSETTS BONDING AND INSURANCE COMPANY,

By FRANK M. HALL,

Its Attorney-in-Fact.

[Seal]

By S. W. PALMER,

Its Attorney-in-Fact.

The foregoing bond is hereby approved this 15th day of November, 1915.

WM. C. VAN FLEET,

United States District Judge. [140]

[Endorsed]: Filed Nov. 15, 1915. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[141]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Cor-
poration, E. T. KRUSE, MARY BELL
PARKER BURNS, CECELIA SUDDEN,
JAMES HOGG, JAMES P. TAYLOR and
KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondent.

Praeceptum for Transcript of Record.

The clerk of the above-entitled court will please prepare a transcript of the record for the Appellate Court in the above-entitled cause, and is hereby directed to insert therein the following:

1. The petition or complaint;
2. The affidavit of service with summons attached;
3. The amended answer of defendant;
4. The stipulation and agreed statement of facts;
5. Stipulation waiving jury;
6. Special findings of fact;
7. Judgment;
8. Plaintiffs' bill of exceptions; [142]
9. All stipulations and orders extending time for settlement of findings;
10. All papers filed by plaintiffs herein in the prosecution of its writ of error, including

140 *J. Homer Fritch, Incorporated, et al.*

petition for the writ of error, assignment of errors, order allowing writ of error, writ of error, citation upon writ of error, and bond on writ of error.

Dated San Francisco, California, November 15th, 1915.

IRA A. CAMPBELL,
Attorney for Plaintiffs.

[Endorsed]: Filed Nov. 15, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [143]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Corporation, E. T. KRUSE, MARY BELL PARKER BURNS, CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondents.

I, Walter B. Maling, Clerk of the District Court of the United States of America, in and for the Northern District of California, do hereby certify that the foregoing one hundred forty-three (143)

pages, numbered from 1 to 143, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, in conformity with the praecipe for record filed herein, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ is \$76.60; that said amount was paid by Ira A. Campbell, Esq., attorney for plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 17th day of November, A. D. 1915.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern
District of California.

By J. A. Schaertzer,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
Nov. 17, 1915. J. A. S.] [144]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Cor-
poration, E. T. KRUSE, MARY BELL
PARKER BURNS, CECELIA SUDDEN,
JAMES HOGG, JAMES P. TAYLOR and
KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Respondent.

Writ of Error.

United States of America,—ss.

The President of the United States to the Honor-
able the Judges of the District Court of the
United States for the Northern District of Cali-
fornia, Greeting:

Because in the record and proceedings, as also in
the rendition of a judgment of a plea which is in
the said District Court before you, or some of you,
between J. Homer Fritch, Incorporated, a corpora-
tion, E. T. Kruse, Mary Bell Parker Burns, Ce-
celia Sudden, James Hogg, James P. Taylor and
Kate E. Spiers, petitioners and plaintiffs, and
United States of America, defendant and respond-
ent, a manifest error hath happened to the great
damage of the said J. Homer Fritch, Incorporated,
a corporation, E. T. Kruse, Mary Bell Parker

Burns, Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers, petitioners and plaintiffs, as by said complaint appears, and we being willing that error, if any hath been, [145] should be duly corrected, and full and just justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you have the same at the City and County of San Francisco, in the State of California, on the 15th day of December, A. D. 1915, in the Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 15th day of Nov., in the year of our Lord one thousand nine hundred and fifteen.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern
District of California.

By J. A. Schaertzer,
Deputy Clerk.

Due admission of service and receipt of copy of the within writ of error is hereby acknowledged

144 *J. Homer Fritch, Incorporated, et al.*

this 16th day of November, 1915.

JNO. W. PRESTON,

M. A. THOMAS,

Attorneys for Respondent. [146]

[Endorsed]: No. 15,599. In the District Court of the United States, Second Division, Northern District of California. J. Homer Fritch, Incorporated, a Corporation, et al., Petitioners and Plaintiffs, vs. United States of America, Respondent. Writ of Error. Filed Nov. 16, 1915. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Answer to Writ of Error.]

The answer of the Judges of the District Court of the United States, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are com-
manded.

By the Court.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [147]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Cor-
poration, E. T. KRUSE, MARY BELL
PARKER BURNS, CECELIA SUDDEN,
JAMES HOGG, JAMES P. TAYLOR and
KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Respondent.

Citation of Writ of Error.

To the President of the United States of America,
to the United States of America, and to Attor-
ney General, and John W. Preston, United
States Attorney General for the Northern Dis-
trict of California, and to M. A. Thomas, Es-
quire, Assistant United States Attorney for the
Northern District of California, Greeting:

YOU AND EACH OF YOU ARE HEREBY
cited and admonished to be and appear in the Cir-
cuit Court of Appeals for the Ninth Circuit at the
City and County of San Francisco, State of Cali-
fornia, within thirty days from and after the date
this citation bears, pursuant to a writ of error filed
in the District Court for the Northern District of
California, Second Division, in the above-entitled
cause whereas J. Homer Fritch, Incorporated, a cor-
poration, E. T. Kruse, Mary Bell Parker Burns,

Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers, are plaintiffs and petitioners, and the United States of America, is defendant and respondent, to show cause, if any there be, why that portion of the judgment [148] heretofore made and rendered in the above-entitled cause on the 5th day of Nov., 1915, wherein it is ordered, adjudged and decreed that said plaintiff take nothing by the second count contained in the petition or complaint on file herein should not be corrected and reversed and why justice should not be done to the parties in that behalf.

WITNESS the Honorable WM. C. VAN FLEET,
United States District Judge for the Northern District of California, this 15th day of Nov., 1915.

WM. C. VAN FLEET,
United States District Judge for the Northern District of California.

Due admission of service and receipt of copy is hereby acknowledged of the within citation and also of the following (1) writ of error; (2) petition for writ of error; (3) bond on writ of error; assignment of errors; order allowing writ of error; praecipe for transcript of record.

San Francisco, California, November 16th, 1915.

JNO. W. PRESTON,

M. A. THOMAS,

Attorneys for Respondent.

Attorneys for Respondent. [149]

[Endorsed]: No. 15,599. In the District Court of the United States, Second Division, Northern District of California. J. Homer Fritch, Incor-

porated, a corporation, et al., Petitioners and Plaintiffs, vs. United States of America, Respondent. Citation of Writ of Error. Filed Nov. 16, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2683. United States Circuit Court of Appeals for the Ninth Circuit. J. Homer Fritch, Incorporated, a Corporation, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division. Filed November 17, 1915. F. D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

No. 2683

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

J. HOMER FRITCH, INCORPORATED (a corporation),
E. T. KRUSE, MARY BELL PARKER BURNS,
CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR
and KATE E. SPIERS,

Plaintiffs in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

IRA A. CAMPBELL,

Attorney for Plaintiffs in Error.

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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No. 2683

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. HOMER FRITCH, INCORPORATED (a corporation),
E. T. KRUSE, MARY BELL PARKER BURNS,
CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR
and KATE E. SPIERS,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

I.

Statement of the Case.

For several years prior to 1911 the Department of Commerce and Labor had chartered from plaintiffs in error their steamer, the "Homer". The Bureau of Fisheries of that Department had used the "Homer" in connection with the Alaska Seal Fisheries, sending her on trips to the Fisheries Station on the Pribilof Islands, and had so used her during from three to four months in the summer of each year (tr. p. 54).

The "Homer" was well suited to the needs of the Department, and ultimately those who had the affairs of the Department in hand recognized the economy and advantage of purchasing her (tr. p. 56). Among these were George M. Bowers, the Commissioner of Fisheries, and W. I. Lembkey, the Agent of the Department of Commerce and Labor for the Alaska Seal Fisheries (tr. p. 54).

Accordingly, in the fall of 1910, when the matter of arranging for the services of the "Homer" for the summer months of 1911 was taken up, considerable correspondence passed between the parties in which the subject of the purchase of the "Homer" by the Department was discussed (tr. pp. 56-78). These negotiations failed because the Department, while it had on hand a fund of \$20,000, which was available for the purchase outright of the "Homer", and other funds which could be used for its charter, was not in a position to pay the full price asked by the owners (tr. p. 72). The negotiations led, however, to the insertion in the charter party for 1911, of a clause permitting the Department "*at any time during the charter*" to purchase the "Homer" for \$45,000, and to apply upon account of the purchase price the amount paid as charter hire during the summer of 1911 (tr. pp. 75-78).

On December 2, 1910, in the course of the correspondence referred to, Lembkey wrote to J. Homer Fritch, who represented the plaintiffs in error in all of these transactions:

“DEPARTMENT OF COMMERCE AND LABOR.
Bureau of Fisheries.

Washington.

Personal.

December 2, 1910.

My dear Mr. Fritch.

“Your letter of November 23, regarding the purchase of the ‘Homer’ is to hand. The Commissioner wished me to write you a personal letter about the matter.

“The Commissioner desires to purchase the ‘Homer’. The terms of purchase, however, require some adjustment. The situation is about as follows, and, as a business man, you will readily grasp it:

“The appropriation, of which we have an unexpended balance this year and from which the purchase of the vessel was contemplated, has been decided to be not available for purchase of a vessel, although it can be used for chartering. We have, however, another appropriation of \$20,000, which can be used for purchase outright of a vessel for Alaska. The object, therefore, if a vessel should be purchased, is to pay the \$20,000 down as part payment of the purchase money, and to have the balance of the latter paid as charter money from the other appropriation.

“If we were to charter the ‘Homer’ this spring, therefore, it would be on the understanding that the charter money so paid should apply on the purchase price. Then we could prolong the charter, perhaps, by laying her up in the Creek or by some other arrangement, until the charter money would reach an amount equal to the balance of the purchase price.

* * * * *

Very truly yours,

(Signed) W. I. LEMBKEY.”

(Tr. p. 64.)

Again, on December 15, 1910, Lembkey wrote:

“DEPARTMENT OF COMMERCE AND LABOR.

Bureau of Fisheries.

Personal. December 15, 1910, Washington.

My dear Mr. Fritch:

“I beg to acknowledge the receipt yesterday of your letter of the 8th instant, in which you state that the idea conveyed in my personal letter of the 2d instant, regarding the purchase of the ‘Homer’, is favorably received.

“I must state frankly that, at first, I partially misunderstood the Commissioner’s idea regarding the arrangements for purchase. It is his desire to make a charter in the usual way as though the question of sale were not under discussion; to allow the charter-money to accrue to an amount equal to the purchase price, less \$20,000; and then, being in a position to state that he virtually could buy the ship for \$20,000, he would proceed to do so. This is the same proposition as contained in my former letter, except that the payment of the \$20,000 occurs at the latter end of the transaction instead of at the beginning. I hope this will make no difference in your calculations.

* * * * *

Very truly yours,

(Signed) W. I. LEMBKEY.”

(Tr. p. 67.)

The charter for 1911 was entered into on April 24, 1911 (tr. p. 17). It contained the option clause as already outlined (tr. p. 23). The Department took the vessel on May 15, 1911 (tr. p. 25). It had returned from its second voyage to the Pribilof Islands and was ready to be turned over to its owners at noon on September 12, 1911 (tr. pp. 25, 28, 83). But on the morning of

September 12, 1911, the Department sent plaintiffs in error a telegram (tr. pp. 26, 39, 43, 83).

The question in this case is whether this telegram contemplated that the charter should be extended with the option, or that the option should be extended but that the charter should terminate. Plaintiffs in error contend that it was an offer to extend the charter, (1) on its face; (2) in view of all of the circumstances under which it was sent, in view of what had gone before, and in view of the subsequent actions of the Department under it. The Government claimed that it was an offer to extend the option only.

The telegram was as follows:

“Washington, D. C., Sept. 12, 1911. 10:07 A. M.
J. Homer Fritch, Inc.

San Francisco, Cal.

Would like to have option for purchase of Homer extended thirty days on terms mentioned in paragraph twenty-one of charter otherwise charter to terminate as provided therein answer.

CHARLES EARL,

Acting Secretary.”

(Tr. p. 26.)

After the receipt of this telegram what occurred was precisely in accord with Lembkey's letter of December 2, 1910. The “Homer” was laid up in Oakland Creek, and there remained for more than thirty days (tr. p. 88).

On September 14, 1911, the Department was advised that *the charter* had been extended. It received from plaintiffs the following telegram:

“San Francisco, Sept. 14, 1911.

“Acting Secretary,
Dept. of Commerce & Labor,
Washington, D. C.

“As requested in your telegram of twelfth instant charter steamer ‘Homer’ hereby extended for further period of thirty days from September thirteenth nineteen eleven with option of purchase.

J. HOMER FRITCH, INC.”

(Tr. pp. 27, 84, 86.)

The Department made no reply to this telegram.

On October 10, 1911, the Department received the following telegram from plaintiffs:

“San Francisco, Oct. 10, 1911.

George M. Bowers,
Commissioner of Fisheries,
Dep’t of Commerce & Labor,
Washington, D. C.

Your extension of charter and option of Steamer ‘Homer’ expires October 13th. Should this expire without further action on the part of the department ship will go to holder of second option upon which one thousand dollars has been paid. Should you indicate that you wish to exercise your option terms of payment can be satisfactorily arranged without doubt. Kindly wire your wishes in the premises.

J. HOMER FRITCH.”

(Tr. p. 28.)

The Department’s reply to this telegram was as follows:

“Washington, D. C., Oct. 12-11.

J. Homer Fritch, Inc.,
Fife Bldg., Sanfran.

Replying yours Oct. ten Bureau of Fisheries is not in position to purchase Homer.

I. H. DUNLAP,
Actg. Commr.”

(Tr. p. 29.)

The first intimation of the Department's position came to plaintiffs two weeks after the expiration of the term of the extension. About November 1, 1911, plaintiffs received the following letter, dated October 25, 1911:

“Washington, October 25, 1911.

Mr. J. Homer Fritch,
110 East Street,
San Francisco, Cal.

Sir:

Replying to your letter of the 14th instant, inclosing duplicate bills for charter of the steamship ‘Homer’ from September 1 to October 13, 1911, inclusive, you are informed that the vessel was discharged and relinquished to her owners on September 12 noon and that the Department has not extended or renewed the charter nor approved the action of any officer of the Department attempting to bind it for charter money beyond that time.

Respectfully,
(Sgd.) BEN J. CABLE,
Acting Secretary.”

(Tr. p. 30.)

On September 13, 1911, Lembkey, being at the time in San Francisco and having been shown the Department's telegram of September 12th, endorsed the following upon the owners' duplicate of the charter:

“According to telegram of September 12th received from Mr. Chas. Earl, Acting Secretary, Department of Commerce & Labor, this Charter is hereby extended for a period of 30 days from September 13th, 1911.

“Subject to approval of Dept. of Commerce & Labor.

W. I. LEMBKEY,
Agent Seal Fisheries.”

(Tr. pp. 26-27; 46; 85-86.)

Plaintiffs in error contend that the true meaning of the telegram of the 12th and the meaning of that telegram in legal contemplation was to offer to extend the charter. By its express, its literal, terms, it was such an offer.

If, however, it be held that it had on its face two possible meanings, then, for several distinct reasons, the court erred in refusing to hold that it was intended as an offer to extend the charter as well as the option. Its language was prepared by the Department. Therefore, under the familiar rule that where an ambiguity appears in a contract, the contract will be given that meaning which is less favorable to the party drawing it, the telegram must be construed not as an offer to extend the option alone, but to extend the charter as well. Again, it must be so construed under the rule that where the language of a contract is ambiguous and one party has notice that the other places a certain construction upon it and does not object, the former will be bound by such construction. This rule applies with full force in this case because by the telegram of September 14th, and again by the telegram of October 10th, the Department was expressly notified that plaintiffs in error so construed the telegram of September 12th. Finally, if the ambiguity existed, then it became the duty of the court to determine the true and intended meaning of the telegram of the 12th in view of all the surrounding facts. As to this, the undisputed evidence of the events leading up to the sending of the telegram, the attendant circumstances, and the contemporaneous and subsequent understanding of the

parties pointed irresistibly to the conclusion that it was intended as an offer to extend the charter as well as the option. There was not a single fact or a single word of testimony tending to establish the contrary.

The case was tried in the District Court without a jury. An agreed statement was filed. Additional proof was offered by plaintiffs to show independently (in the event that the court should hold that there was ambiguity in the telegram of the 12th) that both parties intended an extension of the charter as well as the option. Some of this proof was ruled out as immaterial; the rest was discarded by the court in the making of special findings, and in each instance plaintiffs in error requested that the fact be found, and excepted to the court's refusal.

There were two counts. Plaintiffs had judgment for \$1462.75 on count 1, being the charter hire admittedly due and unpaid from September 1st to 12th, 1911. The second count was for \$4488.75, and rested on the thirty-day extension. Plaintiffs bring the writ of error to reverse the judgment of the District Court denying them a recovery upon their second count.

II.

Assignment of Errors.

Two main points are covered by the assignments:

First, that *on its face* the telegram of September 12, 1911, constituted an offer to extend the charter with the option (Assignments 1, 2, 3, 4, 5, 6, and 10);

Second, that the telegram of September 12, 1911, in view of all the facts and evidence, constituted an offer to extend the charter as well as the option (Assignments 7, 8, 11).

Other assignments under this point are to rulings of the court respecting evidence which plaintiffs offered of facts tending to show that, in the event that the court held that the telegram of September 12, 1911, was ambiguous, its true meaning, as it was intended by the sender, was to offer to extend the charter as well as the option (Assignments 15 to 32, inclusive). Still other assignments under this general heading relate to exceptions by plaintiffs in error to the trial court's refusal to specially find facts established without contradiction by the evidence, which tended to show that the telegram of September 12th, even if ambiguous on its face, was meant as an offer to extend the charter, and not the option alone (Assignments 33 to 48, inclusive).

III.

Brief of the Argument.

The argument for plaintiffs in error will take the following course:

- (A) *On its face the telegram of September 12, 1911, was an express written offer to extend the charter.*

(a) The offer was to extend the option “upon terms mentioned in paragraph 21 of the charter.” Paragraph 21 of the charter gave the right to purchase only during the life of the charter.

(b) The language of the telegram “otherwise charter to terminate” clearly meant that if the offer was accepted the charter should continue.

(B) *If there was an ambiguity in the telegram of September 12, 1911, nevertheless the court should have held that it was intended to extend the charter.*

(a) If the ambiguity existed, then the telegram must be construed as an offer to extend the charter, under the rule that an instrument which has two possible meanings will be given that meaning which is less favorable to the party drawing it. The Department of Commerce and Labor drew the telegram, and it is settled that this rule of construction may be invoked in interpreting a government contract.

(b) Even if the telegram of the 12th was ambiguous and had two possible meanings, it is not disputed that the Department was advised by the telegram of the 14th of the construction which plaintiffs in error placed upon it, and not having objected thereto, it was bound by such construction.

- (c) Assuming that the ambiguity existed, the true meaning should have been ascertained from all of the attendant facts. So viewed, the telegram was unquestionably an offer to extend the charter.
- (d) The same rules should govern the construction of a contract between the United States government and a private individual as one between two individuals.

A.

ON ITS FACE THE TELEGRAM OF SEPTEMBER 12, 1911, WAS AN EXPRESS WRITTEN OFFER TO EXTEND THE CHARTER.

- (a) The offer was to extend the option on terms mentioned in paragraph 21 of the charter, which provided for an option which could only exist while the charter survived.

The telegram of September 12, 1911, read:

“10:07 A. M.

Washington, D. C. Sept. 12-1911.

J. Homer Fritch, Inc.,
San Francisco, Cal.

Would like to have option for purchase of Homer extended thirty days on terms mentioned in paragraph twenty one of charter otherwise charter to terminate as provided therein answer.

CHARLES EARL,
Acting Secretary.”

(Tr. p. 26.)

The option referred to contained in paragraph 21 of the charter read:

“21. That the Charterers have the option, at any time during this Charter, of purchasing the said vessel for the sum of Forty-five Thousand (\$45,000.00) Dollars against which any amount paid for the hire of the said vessel less cost of operation shall be set off and deducted, but that the purchasers shall pay interest at the rate of 6% per annum (and insurance) on the amount of purchase money from the date of this Charter to the completion of sale.”

(Tr. p. 23.)

Paragraph 21 of the charter is expressly referred to in the telegram. It therefore became a part of the offer which the Department placed before plaintiffs.

The telegram particularly asked an extension of the option “on terms mentioned in paragraph 21 of charter”. One of the terms of paragraph 21 of the charter (and a most important one) was that the charterers might purchase “at any time during this charter”. This was one of the terms, therefore, on which the extension of the option was asked.

The charter provided that the charterers should be entitled to set off and deduct any amount paid as charter hire against the agreed price. This right was of substantial benefit to the Government, but it could hardly be expected to outlive the charter. In other words, the charterers could not fairly expect to stop paying hire and still exercise such a privilege. That it was not in the original contemplation of the parties is apparent from the stipulation that the option might be exercised “at any time during this charter”. And that the Department did not really mean to ask such a privilege is made certain, for it asked a continuation

of what the charter, and particularly paragraph 21 thereof, gave it, and nothing more.

The Department asked the extension of an option which, by the terms of the instrument granting it, depended for its continued existence upon the co-existence of the charter. In so doing, it in effect asked that the charter be extended, and that the Department be permitted to use the moneys which it might pay on account of hire, in part payment of the purchase price.

(b) By the phrase "otherwise charter to terminate", the Department clearly said that if the option were extended the charter was not to terminate.

We are now considering the meaning of the telegram solely from the meaning of the words themselves. Later, we shall ask the court that, if necessary, it look at all of the circumstances under which this telegram was sent and determine its meaning in the light of those circumstances.

We submit, however, that in view of this concluding phrase of the telegram, plaintiffs should have recovered.

The proposition is a simple one. The word "otherwise" so used can have but one meaning. A chartered his boat to B, and in his charter gives B the right to purchase the boat "at any time during the charter" and to set off the hire paid against the purchase price. As the charter is about to expire, B says to A: "I want an extension of that option on the terms mentioned in our charter, *otherwise* the charter is to terminate". It is submitted that such language plainly

says: "If you don't grant the option the charter ends; if you do grant the option, *the charter is extended*".

B.

**IF THE WORDING OF THE TELEGRAM WAS AMBIGUOUS
NEVERTHELESS IT APPEARS CONCLUSIVELY THAT IT WAS
INTENDED AS AN OFFER TO EXTEND THE CHARTER.**

Our first contention is that the telegram of September 12, 1911, was by its terms an express offer to extend *the charter with the option*.

But if the telegram was capable of two possible meanings, that is, if it might be read as either an offer to extend *the charter with the option*, or *the option alone*, then it was ambiguous, and no more. If ambiguous in this respect, then we contend:

- (a) That the Department having drawn the telegram, that construction is to be given it which is less favorable to the United States;
- (b) That the Department, having remained silent after being advised of the construction put upon the telegram by plaintiffs in error, is bound by that construction;
- (c) That all of the evidence showed that the parties intended to extend the charter, and not the option alone;
- (d) That the same rules of construction apply to contracts between the government and individuals as between private individuals.

- (a) If the ambiguity existed, then the telegram must be construed as an offer to extend the charter, because the Department drew it. The rule, that where an instrument is ambiguous it is to be given the construction less favorable to the party employing the ambiguous language, has been held to apply to government contracts.

We invoke a settled rule of construction—9 *Cyc.* 590:

“It is a well-settled rule of construction that words will be construed most strongly against the party who used them; the reason for the rule being that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a construction by which they would mean another thing more to his advantage.”

Phoenix Insurance Co. v. Slaughter, 12 Wall.

404; 20 L. Ed. 444;

Noonan v. Bradley, 9 Wall. 394; 19 L. Ed. 757;

Turner v. Meridian F. Ins. Co., 16 Fed. 454;

Otis v. United States, 20 Ct. Cl. 315;

Gantz v. Dist. of Columbia, 18 Ct. Cl. 569.

It has been held by the Fourth Circuit that this rule may be invoked against a Department of the Government.

United States v. Newport News Shipbuilding & Dry Dock Co., 178 Fed. 194:

“The rule that a contract is to be construed most strongly against the party who prepares it applies to the United States with respect to its contracts with private parties.”

The same rule was applied in

Scully v. United States, 197 Fed. 327, 343,

Judge Farrington saying:

“The rule that a contract is to be construed most strongly against the party preparing it applies to the government in a case like this, as well as to an individual.”

The case referred to arose out of an ambiguity existing in a contract between a surveyor and the Surveyor-General of the United States, the contract having been prepared by the latter.

The United States Supreme Court applied the same rule against the government in construing an ambiguous clause in a contract for the purchase of arms in

Garrison v. United States, 7 Wall. 688; 19 L. Ed. 277.

Mr. Justice Miller said:

“The supplementary agreement is signed by General Butler, and not by plaintiff. Its doubtful expressions should, therefore, according to a well known rule, be construed most strongly against the party who uses the language.”

See also

Simpson v. United States, 31 Ct. Cl. 217, 243;

Otis v. United States, *supra*;

Gantz v. Dist. of Columbia, *supra*.

The telegram of September 12, 1911, was drawn and sent by the Department of Commerce and Labor. That Department employed the language out of which the alleged ambiguity arose. We see no possible escape

from the application of the rule established in the cases just noted.

- (b) Even if the telegram was ambiguous, the Department knew which meaning was attached to it by plaintiffs in error, and is therefore bound to that construction.

It is stipulated that on September 14, 1911, the Department actually *received* from plaintiffs in error the following telegram:

“San Francisco, Sept. 14, 1911.

Acting Secretary,

Dept. of Commerce & Labor,

Washington, D. C.

As requested in your telegram of twelfth instant charter steamer ‘Homer’ hereby extended for further period of thirty days from September thirteenth nineteen eleven with option of purchase.

J. HOMER FRITCH, INC.”

Nevertheless, the Department did not utter a word to the effect that this was an incorrect interpretation of its telegram of the 12th until two weeks after the expiration of the thirty days. Even when plaintiffs in error wired it on October 10, 1911, that “your extension of *charter* and option of steamer Homer expires October thirteenth” (tr. p. 28), it did not dissent, but replied simply, “Replying yours October tenth Bureau of Fisheries is not in position to purchase Homer”.

These facts bring the case squarely within a rule settled by the authorities, namely, that where a contract is ambiguous and capable of more than one

meaning, a party will be held to that meaning which he knows the other party has placed upon it.

2 Page on Contracts, Sec. 1127, p. 1752:

“If a promise is so ambiguous as to be susceptible of more than one interpretation and the promisor knows which of these possible meanings the promisee attaches to the promise, that meaning will be adopted by the court in construing the contract. The same rule applies where the promisor has reason to suppose that the promisee understands the ambiguous promise in a particular sense.”

Hoffman v. Aetna Fire Ins. Co., 32 N. Y. 405, 413:

“It is a rule of law, as well as of ethics, that where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was *understood* by the promisee.”

Barlow v. Scott, 24 N. Y. 40:

“A promise is to be interpreted in that sense in which the promisor knew that the promisee understood it.”

And here again we find that the federal courts have applied the general rule of construction against the government in determining the meaning of its contracts with individuals.

In

Central Pac. Ry. Co. v. United States, 28 Ct. Cl.
427,

the Court of Claims held:

“A construction given to a contract by the express declaration of one party and the silent acquiescence of the other, prior to and during the

performance of a service, cannot be repudiated after a party has acted upon the faith of it."

In

Scully v. United States (supra), 197 Fed. 327, 343,

Judge Farrington said:

"It is a well established principle, that when there is a doubt as to the meaning of a contract, a party will be held to that meaning which he knew the other party supposed the words to bear."

Particularly in point is the case of

Brent v. Chas. H. Lilly Co., 174 Fed. 877.

The question was whether the word "bushel" used in a contract meant fourteen pounds. In holding that it did, Judge Donworth, speaking for the Circuit Court in Washington, said:

"There can be no question but that the plaintiff at all times understood the contract to call for 14 pounds to the bushel. The contrary is not seriously contended by defendant. Now in his letter of June 27th to the defendant (Plaintiff's Exhibit E) plaintiff expressly defined a bushel as being 14 pounds; and, while defendant acknowledged the receipt of this on July 2d (Exhibit F), and corrected plaintiff's understanding of the contract in other respects, it made no objection to, or criticism of, this feature of plaintiff's letter. Conceding that defendant was not bound by any notice of the custom defining a bushel as 14 pounds in first placing its order, it was fully informed of plaintiff's understanding to that effect when it received plaintiff's letter of June 27th. * * *

A similar application of the rule is found in

Allen-West Commission Co. v. Patillo, 90 Fed.
628,

where it was held:

“Where plaintiff, who was making advances to defendant, advised him by letters and by statements, from time to time, of the contract under which such advances were made, as he understood it, the defendant could not remain silent, and obtain future advances, without dissenting from such understanding, and afterwards deny the existence of the contract.”

This rule does not rest on any theory of estoppel, so as to prevent its being invoked against the government. This was pointed out in

Central Trust Co. v. Wabash, St. L. & P. Ry. Co.,
34 Fed. 254, 258,

where Judge Thayer said, in holding that a party to an ambiguous contract would be held to that interpretation which was consistent with its subsequent course of conduct under it:

“We do not hold that the conduct of the St. Louis, Kansas City & Northern Railroad and its successors in paying mileage creates an estoppel against it and its successors, but we do hold that the interpretation so put upon the agreement should determine its true construction, unless it is at variance with the express provisions of the instrument, which in this instances does not appear to us to be the case.”

It is submitted that the authorities cited under this heading are conclusive of the case. It is a conceded fact that the Department knew on September 14, 1911,

that its telegram of the 12th had been interpreted by plaintiffs in error as an offer to extend *the charter*. It is and must be conceded that the telegram was at least capable of such a construction. The Department did not say a word to indicate to plaintiffs in error that they were mistaken in their reading of the telegram until long after the thirty days had expired.

What explanation, we ask, have the representatives of the government to make for this implied assent of the Department? The good faith of plaintiffs in error is not denied. Evidence of such good faith was excluded by the trial court on the ground that it was not questioned (tr. pp. 49-50). It was not denied that plaintiff in error's vessel actually was held inactive and at the government's disposal for the full period of thirty days (tr. p. 88). No reason whatever is shown why the Department could not have advised plaintiffs in error of this mistake—if mistake it was. Nothing is presented to overcome the almost necessary conclusion from the facts that the Department's present interpretation of the telegram is an afterthought.

It would be strange if no legal barrier to so grossly unfair a course of conduct could be found.

We respectfully submit that the case is squarely within the rule invoked, and that, assuming that there is an ambiguity in the telegram of September 12th, the Department must be held to the construction which it knew plaintiffs in error had placed upon it—namely, that it was an offer to extend *the charter* as well as the option.

- (c) Assuming that the ambiguity existed, the true meaning should have been ascertained from all of the attendant facts. So viewed the telegram was unquestionably an offer to extend the charter.

Where an ambiguity exists in a contract its true meaning must be ascertained by a consideration of all of the attendant circumstances. The court must place itself so far as possible, in the situation of the parties, in order to determine what they intended by the ambiguous language.

9 Cyc., 587:

“To determine the intention of the parties, if the meaning is not clear, it is necessary that regard shall be had to the nature of the instrument itself, the condition of the parties executing it, and the objects which they had in view, for which purpose parol evidence is admissible.”

Merriam v. United States, 107 U. S. 437; 27 L. Ed. 531:

“In the construction of contracts the courts may look, not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made.

* * *

“It is a fundamental rule that in the construction of contracts the courts may look, not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made.”

In

Reed v. Merchants Mutual Ins. Co., 95 U. S. 23;
24 L. Ed. 348,

a clause in an insurance policy was found to be ambigu-

uous. The clause read "the risk to be suspended while vessel is at Baker's Island loading". The insurance company claimed that this meant "at any time while the vessel is at Baker's Island for the purpose of loading"; the insured claimed that it meant only while the vessel was actually engaged in loading.

In reaching a determination as to the meaning of this clause the court said, speaking through Mr. Justice Bradley:

"A strictly literal construction would favor the latter meaning. But a rigid adherence to the letter often leads to erroneous results, and misinterprets the meaning of the parties. That such was not the sense in which the parties in this case used the words in question is manifest, we think, from all the circumstances of the case. Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the court, in construing their language, from falling into mistakes and even absurdities. On this subject Professor Greenleaf says: 'The writing, it is true, may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties; but, as they have constituted the writing to be the only outward and visible expression of their mean-

ing, no other words are to be added to it, or substituted in its stead. The duty of the courts in such cases is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express, but what is the meaning of the words they have used.' 1 Greenl. Ev., sec. 277. Mr. Taylor uses language of similar purport. He says: 'Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and, in order to do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter. With this view, extrinsic evidence must be admissible, of all the circumstances surrounding the author of the instrument.' Taylor, Ev., sec. 1082. Again he says: 'It may, and indeed it often does, happen that, in consequence of the surrounding circumstances being proved in evidence, the courts give to the instrument, thus relatively considered, an interpretation very different from what it would have received, had it been considered in the abstract. But this is only just and proper; since the effect of the evidence is not to vary the language employed, but merely to explain the sense in which the writer understood it.' Taylor, Ev., sec. 1085.

"The principles announced in these quotations with the limitations and cautions with which they are accompanied, seem to us indisputable."

Speaking of the construction of an ambiguous clause in a grant, the Supreme Court said in

Cavazos v. Trevino, 73 U. S. 773; 18 L. ed. 813:

"In construing this grant, the attendant and surrounding circumstances, at the time it was made, are competent evidence for the purpose of placing the court in the same situation, and giving it the same advantages for construing the paper, which were possessed by the actors themselves. The object and effect of such evidence are, not to con-

tradict or vary the terms of the instrument but to enable the court to arrive at the proper conclusion as to its meaning and the understanding and intention of the parties.”

In a recent decision written by Chief Justice White, the Supreme Court affirmed a judgment of the Court of Claims against the United States.

United States v. R. P. Andrews & Co., 207 U. S. 229; 52 L. ed. 185.

The judgment was for the price of certain paper furnished by the plaintiff to the authorities in the Philippine Islands. The contract was in writing, but was ambiguous as to whether or not the United States or the Insular Government was the direct contracting party. In an extensive opinion Chief Justice White held that in view of all of the attendant circumstances, the negotiations for the contract, its execution and the subsequent conduct of the parties with respect to it, the Government of the United States was liable.

Plaintiffs in error stand first upon the ground that the language of the telegram of September 12, 1911, makes it an *express* offer to extend the charter as well as the option. If, however, it is held that the telegram is ambiguous and that therefore the court must look to the surrounding circumstances to determine which meaning was intended by the parties, there can be but one result.

The prior transactions—the circumstances leading up to the sending of the telegram—show that the extension of the charter was what was intended.

The Department had on hand a fund of \$20,000 legally available for the purchase outright of the "Homer". The price asked was \$45,000. The Department had on hand a further sum, which, though not available for the purchase, was available for the chartering of the vessel. We have quoted the letters in which Lembkey, writing for Bowers, the Commissioner of Fisheries, advised plaintiffs of these facts and further advised them of the scheme that the Department had in mind. That was to charter the "Homer" at the usual rate, to insert in the charter an option permitting the purchase during the charter and giving the Department the right to apply moneys due as hire upon the purchase price. It was the intention of the Commissioner, so writes Lembkey in the letter of December 15, 1909,

"to allow the charter money to accrue to an amount equal to the purchase price, less \$20,000; and then, being in a position to state that he virtually could buy the ship for \$20,000, he would proceed to do so."

In the letter of December 2, 1910, Lembkey was even more specific. He says:

"If we were to charter the 'Homer' this spring, therefore, it would be on the understanding that the charter money so paid should apply on the purchase price. Then we could prolong the charter, perhaps, by laying her up in the Creek or by some other arrangement, until the charter money would reach an amount equal to the purchase price."

On September 12, 1911, the Department was confronted with this situation. The "Homer" had earned approximately \$20,000 hire during the summer. This brought the Department within about \$5,000 of the pur-

chase price of the "Homer", less the \$20,000 fund which it had available. An extension of thirty days *of the charter* and the payment of an additional thirty-days' hire would enable the Government to exercise its option. If the charter were not extended the entire benefit of the \$20,000 paid as hire during the summer would be lost.

Under these circumstances—occurring identically as they had been outlined in Lembkey's letters—the telegram of September 12th was sent by the Department.

The contemporaneous understanding of everyone who had anything to do with the telegram was shown to be that it was intended to extend the charter. McKee and Fritch, who handled the transaction for plaintiffs in error, plainly believed it, and their good faith was not questioned (tr. pp. 49-50). That Lembkey, the Department's accredited agent on the Pacific Coast, believed it, is manifest from the endorsement which, on the 13th of September, he placed upon the duplicate of the charter in plaintiffs' possession. That endorsement read:

"According to telegram of September 12th received from Mr. Chas. Earl, Acting Secretary, Depart of Commerce & Labor, this Charter is hereby extended for a period of 30 days from September 13th, 1911.

"Subject to approval of Dept. of Commerce & Labor,

(Tr. p. 27.)

W. I. LEMBKEY,
Agent Seal Fisheries."

Moreover, Lembkey himself drafted the telegram to the Department in which on September 14, 1911, the Department was advised that the *charter* had been ex-

tended "as requested in your telegram of the twelfth instant" (tr. pp. 87, 88).

Finally, the subsequent actions of the Department establish complete acquiescence in the construction placed upon the telegram. As we have already pointed out this affords an independent ground for holding it bound by such construction. Its conduct, however, in remaining silent after being fully advised that plaintiffs considered the charter extended, furnishes additional evidence taken in conjunction with the events antecedent to, and contemporaneous with, the sending of the telegram, of the true meaning of that instrument.

In the entire record there is not one shred of evidence opposed to plaintiff in error's interpretation of this telegram. Not a single official went upon the stand to testify that it was the Department's intention to offer to extend the option alone. On the contrary, we find that Lembkey, the Department's own agent, placed himself irrevocably on record as entertaining the contrary view by endorsing an extension of the charter upon the duplicate held by plaintiffs. Nor is there a single fact shown in the record which can be said to indicate that an extension of the option alone was intended.

We submit, finally, that, if the telegram of September 12, 1911, was on its face susceptible to either of the two constructions, all of the facts which were shown as to the events which led up to it, which attended its sending and receipt, and which manifested the understanding of the parties, demonstrate conclusively that it was viewed and intended by both parties as an offer

to extend the charter. And there is not a shred of evidence, or a single fact, in the record, which supports a contrary view.

- (d) The same rules govern the construction of a contract between the United States Government and a private individual as one between two individuals.

In

United States v. Newport News Shipbuilding & Dry Dock Co., 178 Fed. 194, 203,

Judge Pritchard said, speaking for the Fourth Circuit:

“In construing this contract we should treat it just the same as though it were a contract between individuals rather than an individual and the government as in this instance.”

Citing:

Smoots' Case, 15 Wall. 36; 21 L. Ed. 107,

where Mr. Justice Miller, speaking for the Supreme Court of the United States, said:

“There is, in a large class of cases coming before us from the Court of Claims, a constant and ever recurring attempt to apply to contracts made by the Government, and to give to its action under such contracts, a construction and an effect quite different from those which courts of justice are accustomed to apply to contracts between individuals.

* * * * *

“In approaching the inquiry into the effect which the action of the Bureau of Cavalry, in adopting these new rules for inspection, had upon the rights of the parties to this contract, let us endeavor to free ourselves from the consideration that the Government was one party to the contract, and that it was for a large number of horses; for we hold it to be clear

that the principles which must govern the inquiry are the same as if the contract were between individuals, and the number of horses one or a dozen instead of four thousand.”

In

S. H. Hawes & Co. v. Wm. R. Trigg Co., 65 S. E.
538, 549,

it was said:

“A contract between the United States government and a citizen or a corporation for the building of a boat or vessel for the use of the government or of any department thereof differs in no essential feature from a contract between two citizens, or between an individual citizen and a corporation. The rules of construction are the same in either case, and the contract is entered into subject to the principles referred to above.”

We have already noted that in specific instances the courts have applied, without abatement, the ordinary rules governing the construction of contracts to contracts of the various departments of the United States.

The trial court fell into error in departing from this rule. In deciding the case, the learned trial judge said:

“The COURT. * * * I do not think, Mr. Cassell, that the court would be justified in rendering a judgment *against the Government* on such uncertain evidence. There is room, however, for a different view, perhaps, *but it should be taken by an Appellate Court*. I think that, *sitting as a court of first instance*, I would not be justified in granting the relief asked in your second cause of action. You may have full findings and if the Circuit Court of Appeals takes a different view it would simply result in judgment going your way for the balance.

Judgment can go under the first cause of action for the amount due thereunder.” (Tr. p. 95.) (The italics are ours.)

It is submitted that measured by the ordinary rules which govern the contracts of individuals, the rights of plaintiffs in error are clear. That no different rule should be applied in favor of the Government is, it is submitted, a matter established both in reason and authority.

It is respectfully submitted that the portion of the judgment attacked by the writ of error should be reversed, and that the District Court should be directed to enter judgment in favor of plaintiffs in error for \$4488.75, the amount claimed in the second count of their complaint.

Dated, San Francisco,

March 13, 1916.

Respectfully submitted,

IRA A. CAMPBELL,

Attorney for Plaintiffs in Error.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

J. HOMER FRITCH, INCORPORATED (a corporation), E. T. KRUSE, MARY BELL PARKER BURNS, CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

**BRIEF FOR THE UNITED STATES
OF AMERICA**

JOHN W. PRESTON,
United States Attorney,

M. A. THOMAS,
Asst. U. S. Attorney,
Attorneys for Defendant in Error.

Filed this.....day of March, 1916

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

No. 2683

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. HOMER FRITCH, INCORPORATED (a corporation), E. T. KRUSE, MARY BELL PARKER BURNS, CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,
Plaintiffs in Error,

VS.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR THE UNITED STATES OF AMERICA

Counsel has fairly stated the case, and I find it necessary to add only a few matters.

The evidence shows that on or prior to September 12th, 1911, the date of expiration of the charter party, the defendants had been notified that the voyage was terminated, and the cargo had been discharged (Tr. p. 41), and that the steamship "Homer" was tendered by the Government to the owners (Tr. p. 38) at Oakland Creek, in the Bay of San Francisco (Tr. p. 39).

All transactions and correspondence between the parties were merged in the charter party dated ~~September 2nd, 1910~~ *April 24*, and the charter party is the best and only evidence of its terms and their meaning, so long as they are unambiguous. There has been no claim that any part of the charter is ambiguous, and, so far as it is concerned, we may forget all that went before.

ARGUMENT.

The whole case depends on whether the charter party was extended, or whether the option only was extended by the telegram of September 12th, 1911, and the subsequent correspondence.

The telegram of September 12th, 1911, in terms requested an extension of the OPTION, and not an extension of the CHARTER.

Paragraph 14 of the charter provided "that the charterers shall have the option of continuing the charter for a further period of thirty days (30) on giving notice thereof to the owners or their agents twenty (20) days previous to the expiration of the first named term or any declared option."

If the defendant in error had desired an extension of the charter, it is only reasonable to presume that its agent would have exercised the right under section 14 and would have asked for a continuance of the charter. But he did not do this. He asked for an extension of the option for purchase according to the terms of section 21 of the charter.

It is true that section 21 of the charter provides “that the charterers have the option *at any time during this charter* of purchasing,” etc., on certain terms stated, but the telegram of September 12th, 1911, is not an attempt to exercise the option to purchase. Furthermore, the fact that the charter provides that the charterers have the option at any time during this charter, to purchase, does not preclude the Government from desiring a continuance of the option beyond the term of the charter, nor does it preclude the owners from giving it.

The reasonable interpretation of the phrase “on terms mentioned in paragraph 21 of the charter,” is that it has reference to the matters of purchase price, insurance, interest and cost of operation enumerated in that section, and not to the time within which the option may be exercised. An extension of the charter under section 14 would necessarily extend the option, but it cannot be said that an extension of the option extends the charter necessarily, or at all.

“Otherwise,” as used in the telegram, taken with the context, means “in other respects.”

If an extension of the charter were requested by the telegram, there would be no occasion for, and no sense in, adding the words “otherwise charter to terminate as provided therein.” It would be unreasonable to say “would like to have an extension

of the charter, else the charter terminate," and that is just what counsel for the plaintiffs in error would have you believe was said and intended.

"If the words used clearly show the intention, there is no need for applying any technical rules of construction, for where there is no doubt there is no room for construction."

(9 Cyc 578.)

Counsel attempts to raise a doubt as to the meaning of the telegram of September 12th, 1911, by introducing two letters marked "personal," and dated December 2nd, 1910 (Tr. p. 64) and December 15th, 1910 (Tr. p. 67), respectively, from W. I. Lembkey to Mr. J. Homer Fritch, and by a certain endorsement made at the bottom of Fritch's copy of the charter party by W. I. Lembkey on the 13th day of September, 1911, one day after receipt by Fritch, of the telegram above referred to. These letters show on their face that they are not official, being marked "personal," and there is not a word of evidence in the record to show that the Secretary of Commerce and Labor or the Commissioner of the Bureau of Fisheries, ever saw them, or knew anything about them.

The fact that they were marked "personal," indicates that the correspondence was not intended for the eyes of the Secretary or the Commissioner, or anybody other than Lembkey and Fritch.

The endorsement made by W. I. Lembkey at the bottom of the charter party, expressly states that it

is "subject to the approval of the Department of Commerce and Labor," and there is no evidence of approval, or even knowledge, of this endorsement by the Secretary, or any other officer of the Department. The endorsement having been made only on the copy in the hands of Fritch, there is every presumption that the Department knew nothing about it.

Lembkey, although he was agent of Seal Fisheries, is not shown to have had any authority either with regard to the letters, or the endorsement, and these transactions show, if anything, an effort on his part, to do something irregular in connivance with J. Homer Fritch. The law does not contemplate that the United States shall be bound by any secret understanding between J. Homer Fritch and a subordinate government officer, without authority.

From the foregoing, we contend that any secret or private understanding or correspondence between Lembkey and Fritch can in no way show the intention of the Secretary of Commerce and Labor when he composed the telegram of September 12th, 1911.

Counsel further argues that a contract was closed extending the charter for a period of thirty days from and after September 13th, 1911, upon receipt by the Secretary of the telegram of September 14th, 1911 (Tr. pp. 27, 84, 86), and the failure upon his part to reply to the telegram or to notify J. Homer Fritch that he did not desire an extension of the

charter. But what did the telegram of September 12th, 1911, request? It requested an extension of the option for thirty days, and not an extension of the charter. There was no meeting of the minds, and therefore no contract as to the extension of the charter, for the offer contained in the telegram to Fritch was not accepted. (9 Cyc 398-d.)

“When an offer is made, and an acceptance is made not in accordance with the offer there is no contract and the attempted acceptance becomes a counter-offer.”

(9 Cyc 267-d.)

The counter-offer, before it can create a contract, must be accepted. (9 Cyc 270.)

The record does not show an acceptance by any authorized officer of the government, of this counter-proposal, to extend the charter, and it is fitting to add here that the fact that Lembkey drafted this telegram sent by Fritch and dated September 14th, 1911 (Tr. p. 87), is further evidence of his desire to play into the hands of Fritch by attempting to fasten upon the government an extension of the charter, and not merely of the option as requested by the Secretary of Commerce and Labor.

Counsel suggests that the Government is bound to an extension of the charter for the thirty-day period because the Secretary of Commerce and Labor permitted the plaintiff to act on the assumption that the charter had been extended. What act did the

plaintiff do? The record shows that the steamship "Homer" was laid up in Oakland Creek at the time that the telegrams passed, and the fact that it remained there for thirty days or a longer time, is not shown to be other than the disposition that would have been made of it if there had been no negotiations for an extension of the option.

Counsel has cited the rule that words will be construed most strongly against the party who used them (9 Cyc 950). On page 591 of the same volume these words are found:

"But this rule it is said, is the last one the courts will apply, and then only if a satisfactory result cannot be reached by the other rules of construction."

The language of the telegram of September 12th, 1911, is not ambiguous when taken in connection with the charter party.

The telegram of September 14th, 1911, undertook to give an extension of the charter, in addition to an extension of the option. The defendant in error was bound only by so much of that telegram as met his offer, and was not bound to advise the plaintiff in error that it did not wish something it had not asked for.

The attempted extension of the charter made by Lembkey on the copy held by Fritch, had no binding effect on the Government or any of its departments, as it was made subject to approval, and was never

approved. The letters by which plaintiffs in error attempt to prove that "option" means "charter" as used by the Secretary of Commerce and Labor in his telegram of September 12th, 1911, do not throw any light on the intention of the parties for the reason that they were personal between Lembkey and Fritch, and are not shown to have ever reached the files of the office or anybody other than Lembkey, who apparently spent a good part of his time working for Fritch.

The Government respectfully submits that there is no error in the record, and that the facts which are for the most part undisputed, justify the findings of the trial court, and the judgment rendered thereon.

Respectfully submitted,

JOHN W. PRESTON,
United States Attorney,

M. A. THOMAS,
Asst. U. S. Attorney,
Attorneys for Defendant in Error.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

J. HOMER FRITCH INCORPORATED (a corporation), E. T. KRUSE, MARY BELL PARKER BURNS, CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,

Plaintiffs in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

**PETITION FOR A REHEARING IN BEHALF
OF PLAINTIFFS IN ERROR.**

IRA A. CAMPBELL,
Merchants Exchange Building, San Francisco,
*Attorney for Plaintiffs in Error
and Petitioners.*

Filed this.....*day of July, 1916.*

FRANK D. MONCKTON, Clerk.

By.....*Deputy Clerk.*

No. 2683

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. HOMER FRITCH INCORPORATED (a corporation), E. T. KRUSE, MARY BELL PARKER BURNS, CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,

Plaintiffs in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

PETITION FOR A REHEARING IN BEHALF OF PLAINTIFFS IN ERROR.

*To the Honorable William B. Gilbert, Presiding Judge,
and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:*

Plaintiffs in error respectfully ask a rehearing upon the following grounds:

- (1) The opinion misstates a rule of law;
- (2) The opinion contains a misstatement of the record;

(3) The opinion overlooks several points on which plaintiffs in error placed great reliance in bringing the writ.

I.

THE OPINION MISSTATES A RULE OF LAW.

The telegram of September 12, 1911, read as follows:

“Washington, D. C., Sept. 12, 1911. 10:07 A. M.
J. Homer Fritch, Inc.

San Francisco, Cal.

Would like to have option for purchase of Homer extended thirty days on terms mentioned in paragraph twenty-one of charter otherwise charter to terminate as provided therein answer.

Charles Earl,
Acting Secretary.”

(Tr. p. 26.)

The court holds—as urged by plaintiffs in error—that this telegram was ambiguous.

The telegram of September 14, 1911, read:

“San Francisco, Sept. 14, 1911.

Acting Secretary,

Dept. of Commerce & Labor,

Washington, D. C.

As requested in your telegram of twelfth instant charter steamer ‘Homer’ hereby extended for further period of thirty days from September thirteenth nineteen eleven with option of purchase.

J. Homer Fritch, Inc.”

(Tr. pp. 27, 84, 86.)

Plaintiffs in error claimed that, having received this telegram on September 14, 1911, and not having replied to it until October 25, more than two weeks after the

termination of the extension period, the Department was bound by the construction of the telegram of the 12th which it contained. They invoked a rule supported by abundant and unquestioned authority, and stated by Judge Farrington in

Scully v. United States, 197 Fed. 327, at p. 343, as follows:

“It is a well established principle, that when there is a doubt as to the meaning of a contract, a party will be held to that meaning which he knew the other party supposed the words to bear.”

The court holds that plaintiffs in error are not entitled to invoke this rule because (so it is said) they failed to show “that they were induced to change their position for the worse”,—in other words because their case lacked one element of estoppel.

But the rule invoked *does not depend upon estoppel at all. It is purely a rule of construction.*

This was held expressly in a case cited at page 21 of plaintiffs in error’s brief, of which the court makes no mention.

Central Trust Co. v. Wabash At. L. & P. Ry. Co.,
34 Fed. 254-258,

in which Judge Thayer said:

“We do not hold that the conduct of the St. Louis, Kansas City & Northern Railroad and its successors in paying mileage creates an estoppel against it and its successors, but we do hold that the interpretation so put upon the agreement should determine its true construction, unless it is at variance with the express provisions of the instrument, which in this instance does not appear to us to be the case.”
(p. 258)

We cited numerous cases by the federal courts, including the United States Supreme Court, in which this rule was invoked against the United States. *It cannot, therefore, be a rule of estoppel.* Estoppel can never be invoked against the sovereign. The court's opinion is, therefore, in direct conflict with the following cases cited in plaintiffs in error's brief.

Garrison v. U. S., 7 Wall. 688; 19 L. Ed. 277;

Scully v. U. S., 197 Fed. 327;

U. S. v. Newport News Shipbuilding & Dry Dock Co., 178 Fed. 194;

Simpson v. U. S., 31 Ct. Cl. 217, 243;

Otis v. U. S., 20 Ct. Cl. 315;

Gantz v. Dist. of Columbia, 18 Ct. Cl. 569.

The case cited by the court as holding that the rule was dependent upon estoppel (*The Alberto*, 24 Fed. 379), would be entitled to no weight against the foregoing direct authorities. But moreover it does not support the proposition. In that case the libelant's conduct clearly estopped him. For that reason the occasion did not arise to invoke the rule as to the construction of the contract.

II.

THE OPINION MISSTATES THE RECORD.

The court says:

“In the present case there is a total absence of showing that the plaintiffs did anything in reliance upon the silence of the Secretary or upon their understanding of the contract. On September 12,

1911, the steamer was in Oakland Creek, and there it remained during the period of the extension of the option. There is no evidence that the plaintiffs would have chartered it or used it or would have done otherwise with it than they did but for the option."

Plaintiffs in error complain bitterly of this statement. In the trial court they offered the most convincing evidence of this character, and the trial judge ruled it out as immaterial. They assigned the rulings as error, and now they are told that the judgment is affirmed because the record is without such evidence. We can do no more than to lay this evidence before the court in this petition:

"MR. CASSELL. Q. Will you state what was the nature of the negotiations you then had pending for the sale of the 'Homer' to other parties in the event that the sale to the Government did not go through in accordance with the terms of the provisions of clause 21 of the charter-party.

MR. THOMAS. We object to the question, if your Honor please, upon the ground that the answer would be immaterial, irrelevant and incompetent and it would have no bearing at all on this case.

THE COURT. He has stated that there were negotiations and that is all that is material; the specific nature of them is not material. The objection is sustained. The fact is Mr. Cassell I do not think it is material whether he had other negotiations. He had a right to want to sell the vessel to the Government, whether he had other people seeking it, or not.

MR. CASSELL. I do not desire to offer anything further in face of your Honor's ruling, but I want to show that the parties were acting in absolutely good faith, and that they actually did have prospects of selling the vessel.

The COURT. You don't have to show good faith in that regard.

The court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 3.

Mr. CASSELL. Q. Mr. McKee, I will show you a contract dated September 15, 1911, signed by yourself and Mr. W. S. Scammell, and I will ask you if that contract was made by yourself and Mr. Scammell on that date.

Mr. THOMAS. If the court please, I desire to object to any testimony concerning this contract as it does not appear to be within the issues—it does not purport to be a contract between the United States and the plaintiff here, and that it is immaterial, irrelevant and incompetent.

Mr. CASSELL. This purports to be a contract between Mr. McKee and Mr. Scammell whereby Mr. Scammell was to purchase the 'Homer' at a stated price. The contract contains this provision: 'If and when the charter on the steamer "Homer" in favor of the United States Government, shall terminate, which is expected to be about 30 days from this date, and if the United States Government does not exercise its option to purchase said steamship "Homer", then the interest of the undersigned in the steamship "Homer" is sold and assigned to said Scammell at the rate of \$35,000 for the entire interest in the vessel.' The court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 4.

Mr. CASSELL. I will offer this as 'Plaintiffs' Exhibit No. 1 for Identification.' The said contract was thereupon marked Plaintiffs' Exhibit No. 1 for Identification and was in the words and figures following:

(PLAINTIFFS' EXHIBIT No. 1 FOR IDENTIFICATION—
MEMORANDUM, DATED SEPTEMBER 15, 1911.)

San Francisco, California, September 15, 1911.

Receipt is acknowledged by the undersigned from Mr. Walter S. Scammell of the sum of One Thousand (\$1000) Dollars, being payment on account of the purchase of the SS. 'Homer' upon the following conditions:

If and when the charter now in force upon the SS. 'Homer' in favor of the U. S. Government which charter contains an option in favor of the U. S. Government to purchase the SS. 'Homer', shall terminate (which is expected to be about thirty days from this date), and if the U. S. Government does not exercise its option to purchase the said SS. 'Homer,' then the interest of the undersigned in the said SS. 'Homer' is to be sold, assigned and transferred to the said Walter S. Scammell upon payment therefor at the rate of thirty-five thousand (\$35,000) dollars for the entire vessel, as follows:

Cash upon delivery of bill of sale, eight thousand (\$8,000) dollars, (including the deposit of \$1,000, herein acknowledged) the balance in five equal notes payable to the order of the undersigned, six, twelve, eighteen, twenty-four and thirty months from date of transfer, bearing interest at six per cent per annum, secured by first mortgage upon the said interest in the said SS. 'Homer'; the maker and form of the said mortgage to be mutually satisfactory to the said Scammell and the undersigned.

If the U. S. Government exercises its option to purchase the said SS. 'Homer', the above deposit of \$1000 is to be returned upon the order of the said Scammell.

If the option to purchase the said SS. 'Homer' is not exercised by the U. S. Government, and the purchase of the said SS. 'Homer' is not completed by the said Scammell (upon the conditions above set forth) within fifteen days after notice to him by the undersigned that the option of the U. S. Govern-

ment has not been exercised, then and in that event the above-mentioned deposit of \$1000 shall be forfeited to the undersigned.

The interest of the undersigned in the said SS. 'Homer' to be transferred free and clear of all liens or indebtedness.

Insurance premium to be prorated.

Time is of the essence of this memorandum.

(Signed) JOHN D. McKEE.

Approved by:

W. S. Scammell.

Witness:

W. J. Woodside.

MR. CASSELL. Q. Will you state when you first heard that the Government had declined to recognize the extension of the charter, the alleged extension of the charter, contained in the telegrams we have referred to?

MR. THOMAS. We object to this as immaterial.

The court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 5.

MR. CASSELL. Q. Was it the belief of yourself, at that meeting and at all times thereafter during the months of September and October, 1911, that that charter had been extended by those telegrams?

MR. THOMAS. I desire to object to that question, your Honor, upon the ground that the belief of Mr. McKee is in nowise binding upon the defendant."

The court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 6.

(Tr. pp. 49-50.)

Q. Do you remember whether during the month of September, 1911, you received any offer from any one other than the Government to purchase the steamer 'Homer'?

Mr. THOMAS. We object to that question as incompetent, irrelevant and immaterial.

The court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 14.

Mr. CASSELL. Q. Were negotiations pending during the month of September with other parties than the Department of Commerce and Labor in which you were looking towards the sale of the Steamer 'Homer' to such parties in the event that the Government did not exercise its options?

Mr. THOMAS. Same objection.

The court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 15.

Mr. CASSELL. Q. Did those negotiations subsequently go through when the Government failed to exercise its option?

Mr. THOMAS. Same objection.

The court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 16."

(Tr. pp. 90-91.)

See

Assignments of Error, Nos. 17 and 18 (Tr. pp. 122-123.)

Plaintiffs in error were precluded from showing, first, that at all times from September 12 to October 13, 1911, their belief was that the charter was extended (Exceptions Nos. 5 and 6 supra); secondly that although given an opportunity to sell on September 15,

1911, for \$35,000, they refused to sell except “*if and when the charter now in force upon the S. S. ‘Homer’ in favor of the U. S. Government * * * shall terminate*”. (Exceptions Nos. 3, 4, 14, 15 and 16 *supra*).

The trial court refused to let them testify to their continued belief that the charter was extended.

The trial court refused to let them show that acting on this belief they lost interest at six per cent on \$35,000 for thirty days.

They covered these matters in their assignments of error Nos. 17 and 18.

Without any mention whatever of these matters, and without passing upon these assignments, the court holds “that there is a total absence of showing that the plaintiffs did anything in reliance upon the silence of the Secretary or upon their understanding of the contract.”

It is submitted that the rulings of the trial court preventing such a showing require a reversal of the judgment upon the very theory which this court has adopted.

III.

THE OPINION IGNORES POINTS UPON WHICH PLAINTIFFS IN ERROR RELIED IN BRINGING THE WRIT.

Plaintiffs in error invoked the rule that when a contract is ambiguous it is to be given that construction least favorable to the party drawing it. It is admitted

that the Department prepared the telegram of September 12, 1911, which contained the ambiguous language.

In

Garrison v. U. S., supra,

the Federal Supreme Court applied this very rule against the Government as the means of solving an ambiguous contract.

In

Scully v. U. S., supra,

Judge Farrington applied it in the same way.

We cannot believe that, with such authority supporting it and its applicability made clear by the holding of the court that the contract here involved was ambiguous, this rule deserved to be passed by without notice in this case.

Plaintiffs in error contended that, the contract being ambiguous, all of the prior, contemporaneous and subsequent transactions should be looked into by the court to determine its true meaning. They cited repeated and recent decisions of the Supreme Court of the United States to this effect.

Merriam v. U. S., 107 U. S. 437; 27 L. Ed. 531;

Reed v. Merchants Mutual Ins. Co., 95 U. S. 23;

24 L. Ed. 348;

U. S. v. R. P. Andrews & Co., 207 U. S. 229;

52 L. Ed. 185

Plaintiffs in error showed a case under this rule which we submit conclusively established the justness of their demand against the Government. That the court should have omitted the facts upon which plain-

tiffs in error relied in this regard from the statement of the case contained in the opinion, and have failed to discuss the point, we deeply regret. The Department by its letter of December 2, 1910, practically told plaintiffs in error that they might expect a thirty days' extension *of the charter* during September, 1911, and this fact, we submit, was in all fairness worthy of consideration when it came to determining the true meaning of the ambiguous clause in the telegram of September 12, 1911.

Dated, San Francisco,

July 26, 1916.

Respectfully submitted,

IRA A. CAMPBELL,

*Attorney for Plaintiffs in Error
and Petitioners.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for plaintiffs in error and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

IRA A. CAMPBELL,

*Counsel for Plaintiffs in Error
and Petitioners.*

